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In the
Supreme Court of the United States

OCTOBER TERM, 1970

70-221

No. ~~1764~~

THOMAS LICAVOLI,
PETITIONER,

v.

E. L. MAXWELL, Warden,
Ohio State Penitentiary,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Thomas Licavoli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 5, 1971.

Opinion Below

The opinion of the Court of Appeals, as well as the opinion of the United States District Court of the Southern District of Ohio, Eastern Division, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 5, 1971 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Does the admission of testimony of witnesses coerced by State officials without regard for truth deny a defendant his rights to due process of law?

2. Did the circumstances attending petitioner's trial, including but not limited to, massive, persuasive and virulent publicity deluging the community with a presumption of guilt before trial deprive petitioner of his constitutional right to a fair trial within the purview of Sheppard v. Maxwell, 384 U.S. 333.

3. Did the indictment against Petitioner, which charged a conspiracy to murder which was not a crime in Ohio, lack the requisite specificity required under the United States Constitution?

4. Did the totality of the circumstances and conditions existing and occurring in the course of petitioner's trial deprive him of a trial meeting the minimum requirements of due process?

Statement of the Case

Petitioner was indicted by the Lucas County Grand Jury for conspiracy to kill and killing one Abe Lubitsky (Count 1), conspiracy to kill one Abe Lubitsky and killing one Normal Blatt (Count 2), conspiracy to kill one Jack Kennedy and killing one Luise Bell (Count 3), and conspiracy to kill and killing one Jack Kennedy. Petitioner was tried

to a jury, and on November 9, 1934, they returned a verdict of guilty of first degree murder on all four counts with a recommendation of mercy. Petitioner was sentenced to life imprisonment in the Ohio Penitentiary. A direct appeal was taken, and the Lucas County Court of Appeals affirmed Petitioner's conviction on April 24, 1935. In 1965, Petitioner filed a motion for a delayed appeal with the Ohio Supreme Court which was denied on the ground that no debatable constitutional issues were presented.

Petitioner next filed a petition for post-conviction relief pursuant to §2953.21, Ohio Revised Code with the Lucas County Common Pleas Court. The petition was denied on June 2, 1966. Motion for leave to appeal was denied by the Lucas County Court of Appeals and an appeal as of right to the Ohio Supreme Court was dismissed on April 26, 1967, *sua sponte*, the Court holding that there was no debatable constitutional question. On October 9, 1967, certiorari was denied by the United States Supreme Court.

Petitioner petitioned for Writ of Habeas Corpus in the United States District Court for the Southern District of Ohio; Eastern Division and oral argument was heard thereon. In addition to the evidence adduced thereat, the Court accepted for its consideration the trial transcript of State of Ohio v. Thomas Licavoli, No. 21529, Lucas County Common Pleas Court (hereinafter "Tr.") as well as photocopies of newspaper articles appearing preceding and during Petitioner's trial. By opinion and order dated July 9, 1970 the District Court denied Petitioner's petition and dismissed said action. Said opinion and order is reflected in the Appendix hereto commencing on page —. Upon appeal, said judgment was affirmed by the United States Court of Appeals for the Sixth Circuit by opinion decided and filed March 5, 1971. It is from this opinion that this petition stems. During Petitioner's trial, the Prosecutor caused to be imported from Detroit two men known as the Clark

Brothers — although they apparently were not truly brothers. These men were brought into Toledo in order to act as "special investigators" to procure testimony against the Petitioner and his alleged co-conspirators. They were in truth and in fact, *specially trained third degree intimidators who proceeded as shall hereinafter be demonstrated, to beat and torture witnesses until those witnesses agreed to testify, and gave statements the context and purport of which were satisfactory to the Clark Brothers.* (The testimony which they wrung from witnesses was indeed essential and important in the case.)

The prime example and the star witness, whose testimony was contrived by such compulsion was one Sam Stein. Mr. Stein, at the trial, testified that a gun (identified by other testimony as the murder weapon in one of the killings), had been purchased from him by one Jake Sulkin, an alleged lieutenant of the Defendant. Mr. Stein testified (Tr. 1147, et. seq.) that he had told several different stories about the gun. *When he refused to testify in the manner that the Prosecutor wished, he was indicted for murder and held without bail. He was then brought over a weekend to the Prosecutor's office where he was placed in a room with the Clark Brothers, who beat him unmercifully. During the course of the beatings, Mr. Frazier Reams, the Prosecutor, came into say goodnight before going home and one of the Assistant Prosecutors, from time to time, "looked in" the room (Tr. 1157-1176). When Mr. Stein, crazy and terrified by pain and torture, agreed to name Jake Sulkin as the purchaser of the gun, the beatings ceased.* After that a deposition was taken in which he so accused Sulkin. Thereupon, the murder indictment was dropped. He was, from that time on, subject to a charge of perjury by the Prosecutor if he did not testify in the same manner at the trial as in his deposition, and the Prosecution carefully held that threat over his head from that time on.

To punctuate the implied threat to Mr. Stein of a perjury charge, one Ed Beck was called to testify by the prosecution early in the trial and before Stein was called. Prior to Beck's testifying there had been testimony to the effect that Petitioner made his headquarters in a room at the Argonne Hotel. In order to tie the Petitioner into the operation of a still at which Beck had worked, the Prosecutor sought testimony from Beck (Tr. 383) that when he was working at the still he had gone to the Argonne Hotel for pay. At this juncture Beck denied having so informed the Assistant Prosecutor. At the conclusion of Beck's testimony on October 25 (Tr. 389-390) the court was requested by the prosecution to order Beck to remain about the courthouse. The Court did so. *On orders of the Prosecutor*, (and without any apparent order of the Court), *Beck was then arrested. It is stipulated that Beck was then incarcerated in the Lucas County jail, discharged to the Prosecutor on October 27; and on October 29, he recanted and testified in a manner "satisfactory to the prosecutor"*. His arrest was reported in the newspapers, where the headline in the Toledo Blade read "Licavoli Witness Jailed for Perjury". Later, during the course of the trial there was again reported in the Toledo Blade in a story in conjunction with a similar arrest for perjury of one John Brown — of which more later — that he was released after giving testimony satisfactory to the Prosecutor. Obviously, the arrest of Beck for perjury had the effect of coercing him to testify in a manner satisfactory to the Prosecutor. However, the effect of this arrest could hardly have been lost on Mr. Stein who testified after Mr. Beck. Mr. Friberg testified at the hearing before Judge Kiroff and admitted that such an arrest (and the similar arrest of Brown) was unusual.

Similarly coerced into testifying in a manner satisfactory to the Prosecutor was John H. Brown, who had been a gardner at the Petitioner's home. Prior to his being called

by the State, there had been evidence to the effect that one of the murders was accomplished utilizing an automobile, the license plate of which was a wholly fictitious one. The Prosecutor sought testimony from Brown that prior to that murder he saw several of the alleged conspirators in the Petitioner's garage cutting up license plates. Brown, when he first took the stand, would not so testify (Tr. 1275 et. seq.), (Brown did testify that he had been coerced in his original statements to the Prosecutor (Tr. 1285 et. seq.) and that he had said things that were not true (Tr. 1296, 1297, 1298). Not only Brown had been threatened but his wife (Tr. 1287, 1288).) *Immediately following his testimony he was also arrested and incarcerated on the Prosecutor's orders, again without any order of the Court, and later taken to Prosecutor's Ream's office.* He was then recalled and likewise gave testimony in conformity with the Prosecutor's desire (Tr. 1363-1366).

Yet another witness who testified after being coerced by the Clark Brothers and the prosecution in the Prosecutor's office, was Ernest Reid (Tr. 594 et seq). He testified that he had been scared and was afraid of being charged criminally (Tr. 605, 606), was questioned over a period of eight hours (Tr. 601, 602) and that the Clark Brothers "helped him" make identifications (Tr. 603). He testified that the Clark Brothers had called him yellow, swore at him, *and threatened him with jailing.*

Witnesses Harry Craig (Tr. 1210 et seq) and Robert Schwaite (Tr. 1246 et seq), likewise had interviews with the Clark Brothers. Prior to their interviews with the Clark Brothers they had viewed in a lineup the men claimed by the prosecution to have shot victim Kennedy. They did not at that time recognize the alleged killers (Tr. 1237, Craig, 1268, Schwaite), Craig and Schwaite both saw the Clark Brothers numerous times (Tr. 1226). Both Craig and Schwaite were given $5.00 (Tr. 1241) when they identified

the "killers" pictures to the Clark Brothers (Tr. 1227, A1267). They were scared and uncomfortable with the Clark Brothers (Tr. 1240-1271). At the end of the English trial — one of the alleged conspirators — they received a witness fee of $34.00 and an additional $25.00 (A. 1262) after identifying him as having shot Kennedy. They were expecting further money out of this trial (Tr. 1242) to be paid by Prosecutor Reams. The Prosecutor also got Schwaite a job; he had been on relief prior thereto (Tr. 1269).

After the English trial, witness Helen Buder (Tr. 1343 et seq) was taken by a police officer, without any request on her part (Tr. 1348) to the Prosecutor's office with the Clark Brothers, and at that time identified English as the killer in one of the murders. Prior thereto she had told the Clark Brothers that she did not recognize anyone. After this meeting with the Clark Brothers she identified English as the killer.

During Petitioner's post-conviction hearing it was contended that the evidence showed that there was a fever pitch brought upon in the community by prejudicial publicity. The Respondent admitted that such a fever pitch existed but contended that this was caused neither by the trial nor by the newspaper publicity but by the history and experience of the Petitioner already known by the community. It was alleged by the Respondent that "from the time this defendant and gang came to the community, that is when 'fever pitch' started to be brought upon over the course of years by numerous, numerous murders." That it was conceded by Respondent that the Petitioner was the subject of such great anger, fear and disapprobation by the populous that he was severely prejudiced in his right to a fair trial. A reading of the various headlines in the Toledo Blade unequivocally demonstrates the massive, pervasive and prejudicial publicity given to the trial of the Petitioner: ("Where the headline is the main headline, it is designated

by the letters 'MG'. Where the story is continued on another page, the letter 'C' is used.")

"Licavoli, Thirteen Others, Indicted in Slaying. (MH-C, March 8, 1934)

Secrets of Licavoli Gang Reported Told. (MH-C, March 9, 1934)

Licavoli Death Trial Set to Begin October 9. (September 5, 1934)

Jimmy Hayes Found Slain in Detroit Area; Revenge Murder Blamed on Gang (MH-C, October 4, 1934) (A sub headline reads: 'Licavoli Mob Blamed')

Hayes Murder Suspect Seized (MH-C, October 5, 1934) (A sub headline reads, in part: 'Licavoli Gang Linked to Killing')

Licavoli Trial Counsel Asks For Fair Play. (Second section, front page, October 5, 1934)

Alibi Defense To Be Offered For Licavoli (October 8, 1934)

Licavoli Jury Will Not Be Locked Up (C, October 9, 1934)

New Witness Discovered in Licavoli Case (October 10, 1934)

Licavoli Jury is Completed (C, October 12, 1934)

Licavoli Witnesses Missing, Trial is Continued a Week (MH-C, October 15, 1934)

Licavoli Death Penalty Asked (MH-C, October 22, 1934)

Maid Bares Licavoli Conferences in Hotel Room Here (MH-C, October 24, 1934)

Licavoli Witness Jailed for Perjury (October 25, 1934) (Sub headline: 'Defense Counsel Reprimanded by

Judge for Seating Deputy Next to Defendant') (This story should be considered in conjunction with the claim made hereinabove in Point A of this section that witnesses were intimidated by the prosecution. The beginning of this story reads as follows: 'Arrest of a reluctant state witness on the charge of perjury was made on the orders of Frazier Reams, County Prosecutor today, after defense attorneys in the first degree murder trial of Thomas (Yonnie) Licavoli gang leader had been reprimanded by Judge John M. McCabe in the Common Pleas Court') (MH-C)

Firetop's Phone Calls Disclosed (MH-C, October 26, 1945) (Sub headline: 'Defendant Recites Conversations Heard By Tapping Wires of Licavoli Henchmen')

Detective Describes Raid on Licavoli Home (October 26, 1934, P. 12) (This story tells of police seizure of 15 cases of gin and champagne during the honeymoon of Mr. Licavoli and his bride)

Licavoli Gang Trial Tampering Report Denied By Judge (Sub headline: 'Reams Will Probe Mysterious Phone Call Hinting at Attempt to Hang Murder Jury') (MH-C, October 27, 1934)

Louise Bell Murder To Be Described By Only Eye Witness (MH-C, October 29, 1934)

Licavoli Witness Arrest Ordered (MH-C, October 30, 1934) (On the same date the following headline also appeared on Page 1 of the Toledo Blade: 'Charities To Benefit by Jimmy Hayes Will')

Widow Relates Club Pirating (MH-C, October 31, 1934) (Sub headline: 'Mrs. Marks Tells of Licavoli Deal'; 'Yonnie Muscled In On Show Boat After Her Husband's Murder, Witness Testifies')

English Mirabella Named Triggerman in Kennedy Murder (MH-C, November 1, 1934). (Sub headline: 'Craig and Schwaite Tell Story of Gang Killing. Special Witness Awaited')

Woman Tells Murder Story; State Rests Case Against Gangster (MH-C, November 2, 1934)

Licavoli Ex-Gardner Arrested For Perjury (P. 12 November 2, 1934) (This story tells of the arrest of the man above under the order of Frazier Reams)

Brown Faces New Grilling In Gang Trial (Sub headline: 'Racketeer's Gardner May Be Called To Stand Before Prosecution is Closed'; 'State Expected to Rest Monday'; 'Secrecy Veils Plans of Defense to Combat Accusations Against Racket Chief; (MH-C, November 3, 1934)

Krieger, Rhinefort Have Fist Fight In Judge's Chambers. (Sub headline: 'Sheriff and Assistant Prosecutor Battle After Licavoli Testimony Leads to Hot Words'. This, likewise, should be considered in the context of intimidation of witnesses.) (MH-C, November 5, 1934)

Licavoli Trial To Reach Jury This Week (C, November 6, 1934)

Chair Demanded For Licavoli (C, November 7, 1934) (This was the day after election day and the front page announced the re-election of Frazier Reams and Judge McCabe)

Jury May Be Locked Up To Deliberate On Licavoli's Fate (MH-C, November 8, 1934)

Licavoli Sentenced to Life In Prison (MH, November 9, 1934)."

Each count of the indictment charged the Petitioner as one of thirteen persons who conspired to kill and murder

and did kill and murder certain persons. There is no statute in the State of Ohio which makes conspiracy to kill and/or murder an indictable offense. There did exist at time of trial an Ohio statute providing that an aider or abettor might be prosecuted and punished as a principal.

Reasons for Granting the Writ

I. The Admission of Testimony of Witnesses Coerced by State Officials Without Regard for Truth Does Deny a Defendant His Rights to Due Process of Law.

The District Court found as fact that coersion was exercised by the Respondent on several of its witnesses, but found this to lack the required degree of offensivity of a fair trial as to be a denial of Petitioner's right to due process of law. This finding was affirmed by the Court below.

It is axiomatic that the prosecutor owes a far greater duty to the community than merely the obtaining of a conviction. He is required to cause a fair and proper picture of the evidence to be placed before the jury. The prosecutor may not knowingly employ false testimony (*Pyle* v. *Kansas*, 317 U.S. 213 [1942]; and *Mooney* v. *Hollohan*, 294 U.S. 103 [1935]) nor may he suppress or conceal from the defense evidence which might tend to acquit the accused. *United States* v. *Consolidated Laundry*, 291 F. 2d 563 (1961); *United States* v. *Soblen*, 203 F. Supp. 542 (1961); *United States ex rel. Almida* v. *Baldi*, 195 F. 2d 815 (1952); *McMullen* v. *Maxwell, Warden*, 3 O.S. 2d 160 (1965). Nor may he use coerced confessions. *Mooney* v. *Hollohan*, supra; *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Canty* v. *Alabama*, 309 U.S. 629 (1940); *Vernon* v. *Alabama*, 313 U.S. 547 (1941); *Ward* v. *Texas*, 316 U.S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944), *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Miranda* v. *Arizona*, 384 U.S. 136 (1966).

Equally offensive is the testimony of a witness under compulsion, or coercion — one who is compelled to testify while in fear of retaliation, criminal prosecution, or physical injury to his loved ones, or himself. In such instance we have not a trial but an inquisition, *Moore* v. *Dempsey*, 261 U.S. 86 (1923), especially when the coercion is initiated by the Prosecutor, and is given tacit approval by the Court. It defies reality to contend — when witnesses were indicted for murder, beaten, abused, tortured and threatened by the prosecutor, arrested for perjury after their testimony and released only when they agree to testify in the manner demanded by the prosecutor — that there was here a trial conducted within the limits of the requirements of the Due Process Clause. *Cf. McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957). Testimony coerced from a witness is even more suspect and unreliable than from a defendant. A defendant has great motivation to resist coercion; and should he succumb, when he takes the stand, he is under the strongest motivation to renounce a false confession. A witness resists coercion only by dint of the highest morality; and once he succumbs (to give a statement) is under strong motivation not to recant for fear of criminal action against him.

Perhaps a different posture obtains when the coercion ends prior to trial. Then when the witness testifies, he can be assured by the court that he need only tell the truth, and the jury can determine where the truth lies. But when, as here, the coercion continues right through the testimony at the trial, when compulsion techniques—i.e., the perjury arrests in the midst of trial — *continue while the testimony is taken, due process is clearly violated, Moore* v. *Dempsey, supra.*

The vice is accentuated by the court's order to the witness to remain about the courthouse until he could be arrested, and coerced into changing his testimony. Even if the court

did not initially know the purpose for which the request was made, he certainly learned it! It then became his plain duty to take ameliorative measures giving the witness adequate protection against coercion. *Cf. Jones* v. *State,* 211 Ala. App. 505, 109 So. 564, 565. But when the Court lends its power to the coercive process, to whom can the witness turn?

Nor can it be presumed that the lesson was lost on other witnesses. After Beek testified, every witness (e.g., Stein, Bruder, Craig, Schwaite and others) knew the fate he would suffer if he did not give "satisfactory" testimony. And after hearing of what happened to Stein, Beek and Brown, certainly other witnesses were aware that they need not be particular with the truth — that it was only the prosecutor's satisfaction that they were called upon to meet.

The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence *whether true or false. Lisenba* v. *California,* 314 U.S. 219, 62 S.Ct. 280 (1941).

This requirement was not afforded the Petitioner.

II. The Circumstances Attending Petitioner's Trial, Including But Not Limited to, Massive, Persuasive and Virulent Publicity Deluging the Community With a Presumption of Guilt Before Trial Did Deprive Petitioner of His Constitutional Right to a Fair Trial Within the Purview of *Sheppard* v. *Maxwell,* 384 U.S. 333.

It is admitted that the entire city was at a fever pitch of prejudice directed against this Petitioner — who had already been de facto convicted in the community mind of numerous murders. In this context, the prosecutor chose to take advantage of this pre-existing prejudice — brought to

white heat immediately prior to trial by newspaper headlines accusing the petitioner of a brand new murder — bottoming his case upon the contention that Petitioner had brought wholesale murder to the city; and, inferentially, only conviction would end the wholesale slaughter.

The Fifth Amendment right to fair trial by a fair jury is incorporated within the Fourteenth Amendment and controlling here. The goal of that amendment is a "jury capable of taking in, free of prepossessions, evidence submitted in open court," and to avoid a trial when the "minds" of "fallible men and women — before they enter the jury box," are "saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Irvin* v. *Dowd*, 336 U.S. 717, 729, 730 (1948) (Frankfurter, J., concurring). When the community is permeated with a preconceived conviction of guilt, fairness is so difficult to attain "the court (does) not stop to consider the actual effect * * *, but (strikes down the conviction on the ground that prejudice (is) inherent * * *)," *Estes* v. *Texas*, 381 U.S. 532 (1965). The question is not whether there is a juror so biased that he acknowledges the fact. The question is, would it "*be difficult to say that each (juror) could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man*;" *Irvin* v. *Dowd*, *supra*, at 727. See also *Delaney* v. *United States*, 199 F. 2d 107 (1952) (C.A. 1).

Publicity before and during the time of the trial creates problems apart from prejudice; jurors and witnesses have often reacted peculiarly when aware of the presence of an audience created by the mass media, *Estes* v. *Texas*, *supra*, Douglas, *The Public Trial and The Free Press*, 33 Rocky Mt. L. Rev. 1 (1960). The jury here was obviously aware of the audience. Their pictures appeared in the paper, and

rumors of jury tampering were reported in the press (13 Oct. 27 — App. C, *infra*). As in *Sheppard* Appellant was publicly accused by the police and the newspapers of the murders, and his denials reported in detail. But here, not only were these accusations made, and denials reported in the press; but the police were permitted to testify to them at length to the jury.

Indeed this case goes beyond the cases noted in this section — even beyond such as *Chambers* v. *Florida*, *supra*. Here we find prejudice created not only by anger, passion and excitement, not only by a desire for retribution of a believed wrongdoer, but by a hysteria *created by fear — by a basic, elemental terror of death*. No juror in this case could escape the implication so carefully nurtured by the Prosecutor that he could be the next to feel the lead of Petitioner's guns.

The Court below found that the pre-trial and trial publicity in the instant case was not of such proportions as to deprive Petitioner of his right to a trial by a fair and impartial jury and held that "very little speculation, overt or implied, appears concerning the probable outcome of the proceedings or the guilt or innocence of the accused." Also relied upon was the failure of Petitioner to move for change of venue at time of trial. It is respectfully submitted that this descriptive summary of the circumstances attending Petitioner's trial is inaccurate.

The requirement of an impartial trial includes the entire atmosphere in which a trial is conducted. The test is not whether prejudice found its way into the jury box at the trial. The test is whether outside influences affecting the community's climate of opinion as to a defendant are inherently suspect. *Pamlin* v. *Mason*, 364 F. 2d 1 (5th Cir. 1966). The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. *Craig* v. *Harney*, 331

U.S. 367, 67 S.Ct. 1249 (1947) (Dissent of Justice Jackson). The underlying constitutional law issue is whether the atmosphere of the community had been so saturated by adverse publicity as to deprive the trial of the constitutional law requirement of due process. It is no answer that counsel never moved at trial for a change of venue, for this failure of counsel is the very heart of the wrong done to the defendant. *Whitney* v. *Florida*, 389 S.Ct. 138, 88 S.Ct. 314 (1967) (Dissent of Justice Douglas).

The circumstances attending Petitioner's trial rendered it extremely likely that the jurors were impregnated by the environing atmosphere (see dissenting opinion of Justice Holmes and Hughes in *Frank* v. *Mangum*, 237 U.S. 309, 35 S.Ct. 582 ([1915]).

It is, accordingly, respectfully submitted that the instant case represents a situation wherein the Petitioner was subjected to trial under thoroughly publicized and scandalized circumstances. He was the victim of a publicity campaign resulting in prejudicial atmosphere of hatred and antagonism in the trial community engendered by means of publicity and otherwise. This resulted in a trial conducted in a "carnival atmosphere" in which a fair trial was denied Petitioner. (See *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S. Ct. 1507 [1966]).

III. The Indictment Against Petitioner, Which Charged a Conspiracy To Murder Which Was Not a Crime in Ohio, Did Lack the Requisite Specificity Required Under the United States Constitution.

As hereinabove stated there exists no Ohio statute condemning conspiracy to kill and/or murder. There did and does exist a statute promulgated that an aider or abettor might be prosecuted and punished as a principal.

An aider and abettor is entirely to be distinguished from a conspirator. The two terms cannot be regarded as syn-

onymous. *State* v. *Snell*, 2 O. N. P. 55 at p. 57, 5 O. D. 670, 672 (Common Pleas, 1898). Participation in the commission of an offense *is not shown by showing the accused to have been a member of a conspiracy but by showing the accused to have aided, abetted or procured another to have perpetrated a crime.* There must always exist a relation to the offense and the principal offender. It is aimless in Ohio law to speak of, or to prove, the conspiracy which is without legal significance in Ohio. In *Nye and Nissen* v. *United States*, 336 U.S. 613, 93 L. Ed. 919, at p. 925 (1948), the court made the distinction between *aiding and abetting* and *conspiracy* in a case in which both *aiding and abetting* and *conspiracy* were present.

An indictment which glosses over the difference between conspirator, and aider and abettor, *particularly one which settles upon and furnishes the basis for prosecution for a crime which does not exist is void per se*; it is void as a denial of due process in that it does not accord to the accused the federal constitutional right to enjoy in all criminal prosecutions the right to be informed of the nature and cause of the accusation, *cf. State* v. *Whitmore*, 126 O. S. 381; *DeBrul* v. *State*, 80 O. S. 52; *Greenland* v. *State*, 6 O. Dec. 313, 4 O. N. P. 122.

Failure to allege in the indictment one of three possible ultimate fact situations, viz., (1) that a named person was the principal, (2) that Petitioner was one of the thirteen persons named in each of the counts, but that it was not known to the prosecution which one of said thirteen persons was the principal aided and abetted to commit the violent and criminal homicides, or (3) that the principal was unknown to the prosecution and could not be ascertained, — *constituted a failure to accord to the said defendant his fundamental Federal constitutional right to be informed of the nature and cause of the accusation.*

The failure to state one of the said three situations of

fact required the impermissible assumption that because the homicides did in fact occur, they were as a fact produced by the alleged conspiracy,—albeit conspiracy is not a crime in Ohio.

IV. The Totality of the Circumstances and Conditions Existing and Occurring in the Course of Petitioner's Trial Did Deprive Him of a Trial Meeting the Minimum Requirements of Due Process.

In addition to the trial irregularities hereinabove alleged, this Honorable Court's attention is respectfully referred to the remarks of the prosecutor in final argument (Tr. 1520) in which he stated "he (Petitioner) hasn't courage, he is a coward, he is hidden behind alibis, hidden behind others and here he hides behind his lawyers." Petitioner submits that despite the non-restrospectivity of *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), these remarks refer not merely to Petitioner's failure to testify but in addition abrogate the basic right to counsel and therefore constitutes a determinative element of a lack of due process.

It is Petitioner's contention that the "totality of the circumstances" attending his State trial constitutes a deprivation of due process of law. Petitioner does not intend to infer that any of the individual grounds for relief heretofore alleged do not by themselves justify the granting of his petition but urges the Court, in addition to the individual merits thereof, to also consider the entirety of the trial record and to evaluate the totality of the attending circumstances.

In a Federal Habeas Corpus proceeding, the Court must consider the entire State record and must independently ascertain whether there exists factual and legal support for the constitutional issues presented. *Bell* v. *Patterson*, 402 F. 2d 394 (Colo. 1968).

A Federal Habeas Corpus Court has a duty to make an independent determination that due process has been observed in State adjudications. *Maes* v. *Patterson*, 401 F.2d 200 (Colo. 1968).

The question presented before this Honorable Court is the present legality of the restraint of liberty to which the Petitioner is subjected, *not whether the restraint was appropriate or justified in the past. Hammond* v. *Lenfest*, 398 F.2d 705 (Conn. 1968).

The critical question in a Habeas proceeding by a State prisoner in Federal District Court is not whether prisoner is guilty *but whether he received a fair trial. Royal* v. *Dutton*, 392 F.2d 544 (Ga. 1968).

An allegation of innocence of the Petitioner is not a proper matter for consideration in a Habeas Corpus proceeding but rather the Court should focus its attention on whether or not said Petitioner received the benefits of due process. *Fulford* v. *Dutton*, 380 F.2d 16 (Ga. 1967).

It is the function of Federal Courts on Habeas Corpus collateral attack to make their own investigation of record and make their own findings. *U. S. ex rel Rutherford* v. *Deegan*, 406 F.2d 217 (N.Y. 1969).

The core question on a Petition for Writ of Habeas Corpus is "fairness of trial". *U. S. ex rel Lowry* v. *Case*, 283 F. Supp. 744 (Pa. 1968).

In determining whether there has been a denial of due process because of irregularities which allegedly deprived Petitioner of a fair trial, *the inquiry on Habeas Corpus is directed to a review of the entire proceedings and not just to each step and part thereof. Application of Stecker*, 271 F. Supp. 406 (N.J. 1966).

The Petitioner contends that if it has been proper in the past to tell a jury that silence by a defendant in a criminal case ought to be considered by them as evidence of his guilt it has never been true that the hiring of a lawyer could be

argued as evidence of an incriminatory nature. The right to counsel is a foundation of our constitution and the exercise of that right has never been analogous to the exercise of the protection accorded by the Fifth Amendment. It has never been, nor will it ever be, proper in any Court to advise a jury that the hiring of an attorney is an indication of a defendant's guilt. There has never been, nor will there ever be, an obligation on the part of a defendant to defend himself without the aid of counsel. The trial jury, in the instant case, was entitled to infer by the statement of the prosecutor that your Petitioner was "hiding" behind his counsel. There shall never exist a price to bear nor an obligation to assume which attends the right to legal representation.

Petitioner is well aware of the inherent powers of any Court, via contempt, to deal with recalcitrant witnesses. The violations complained of in the instant matter are not and should not be analogized to the calm decorum of a trial judge empowered to exercise a contempt power for refusal to testify. There exists no constitutional provision for the Clark brothers waiting outside a courtroom to "converse" with witnesses. The Petitioner's constitutionally guaranteed right to the presumption of innocence was thereby denied.

It is the Petitioner's contention that the testimony of witnesses Beck, Stein and Brown was illegally coerced and was illegaly used as the conduit for the reception by the jury of incriminatory evidence against the Petitioner.

Petitioner faced trial, penalized for exercising his right to counsel, in an atmosphere pervaded by the political fact that the trial judge and prosecutor were standing for election which indeed took place during the waning moments of the trial. This inherent evil, it is respectfully submitted, cannot be overlooked for its compelling prejudicial effect. Can it be reasonably doubted that the trial Court, in its ruling on Petitioner's Motion for a Directed Verdict on

November 3, 1934 was not influenced by the impending election of November 7, 1934?

The Petitioner submits that the instant circumstances fall far below the minimum standards of constitutional due process.

Conclusion

The Petitioner has spent approximately 36 years of his life behind bars. Surely the progression of constitutional law does not turn its back upon the past. Petitioner's trial, as it was originally held, could not take place today. Nevertheless, in spite of retrospective limitations, the long and healthy arm of due process reaches and indeed touches the instant cause. The whole must stand or fall upon the sum of its parts. In the totality of the instant context, Petitioner's conviction must fall. The constitutional irregularities of his trial combined with the amount of time he has spent in prison and further combined with our modern concept of penal rehabilitation as opposed to penal punishment dictates the demand of justice to be that Petitioner be released from a custody exclusively based upon the total absence of due process of law.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20670.

THOMAS LICAVOLI,
PETITIONER, APPELLANT,
v.
E. L. MAXWELL, WARDEN,
RESPONDENT, APPELLEE.

APPEAL
from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed March 5, 1971.

Before: WEICK, MILLER and KENT, Circuit Judges.

PER CURIAM. Appellant was convicted of murder in 1934 in Lucas County, Ohio. A direct appeal was taken and the conviction was affirmed in 1935. In 1965 appellant filed a motion for a delayed appeal with the Ohio Supreme Court which was denied. Post-conviction relief was sought under the laws of the State of Ohio in 1966, and concluded when the appeal was dismissed in April, 1967, by the Ohio Supreme Court. Certiorari was denied by the United States Supreme Court on October 9, 1967, 389 U.S. 830. Thereafter appellant filed an application for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. In his application for the writ the appellant contended that he was denied his right to a fair trial for the following reasons:

(1) Testimony of witnesses at petitioner's trial was coerced by State officials without regard for truth; and that the admission of the testimony into evidence denied petitioner his rights to due process of law.

(2) Petitioner was deprived of his constitutional right to a fair trial by a community permeated with an atmosphere of prejudice by reason of unfair and prejudicial publicity.

(3) The totality of the circumstances and conditions existing and occurring in the course of the trial deprived petitioner of a trial meeting the minimum requirements of due process.

(4) The four count indictment which charged petitioner as one of thirteen persons who conspired to kill certain persons was defective in that it lacked the requisite specificity required under the United States Constitution.

These same contentions are urged on this appeal.

The District Court accorded the appellant a full and complete hearing, at which he was represented by able counsel of his own choosing. The District Judge in a very carefully prepared memorandum opinion discussed each of the issues raised at length. It appears from the record that all of the alleged coercion of the prosecution witnesses was made known to the trial jury. The District Judge analyzed all pretrial and trial publicity and concluded that such publicity fell far short of that which was found constitutionally reprehensible in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). The District Judge examined the record and concluded that the conduct of the trial satisfied the requirements of due process and also concluded that the indictment under which the appellant was convicted was a valid indictment under Ohio law at the time that it was returned.

For the reasons given by District Judge Joseph P. Kinneary in his memorandum opinion this Court is satisfied that the petition for writ of habeas corpus was properly denied and the action was properly dismissed.

Judgment affirmed.

APPENDIX B

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241. This matter came to be heard on oral arguments of the parties. The case has been submitted to the Court on the petition, return of writ, supplemental return of writ, memorandum of the parties, transcript of *State of Ohio* v. *Thomas Licavoli*, No. 21529, Lucas County Common Pleas Court, October 9 - November 9, 1934, [hereinafter Tr.], photocopies of articles appearing in the Toledo *Blade* preceding and during petitioner's trial, transcript of petitioner's post-conviction hearing, and petitioner's briefs before the Lucas County Court of Appeals, the Ohio Supreme Court and the United States Supreme Court.

Petitioner was indicted by the Lucas County Grand Jury for conspiracy to kill and killing one Abe Lubitsky (Count 1), conspiracy to kill one Abe Lubitsky and killing one Norman Blatt (Count 2), conspiracy to kill one Jack Kennedy and killing one Louise Bell (Count 3), and conspiracy to kill and killing one Jack Kennedy. Petitioner was tried to a jury, and on November 9, 1934, they returned a verdict of guilty of first degree murder on all four counts with a recommendation of mercy. Petitioner was sentenced to life imprisonment in the Ohio Penitentiary. A direct appeal was taken, and the Lucas County Court of Appeals affirmed petitioner's conviction on April 24, 1935. In 1965 petitioner filed a motion for a delayed appeal with the Ohio Supreme Court which was denied on the ground that no debatable constitutional issue was presented.

Petitioner next filed a petition for post-conviction relief pursuant to §§ 2953.21, Ohio Revised Code with the Lucas

County Common Pleas Court. The petition was denied on June 2, 1966, Motion for leave to appeal was denied by the Lucas County Court of Appeals and an appeal as of right to the Ohio Supreme Court was dismissed on April 26, 1967, *sua sponte,* the Court holding that there was no debatable constitutional question. On October 9, 1967, certiorari was denied by the United States Supreme Court.

Petitioner contends that he was denied his right to a fair and impartial trial and that he was not afforded due process of law in each of the following respects:

(1) Testimony of witnesses at petitioner's trial was coerced by State officials without regard for truth; and that the admission of the testimony into evidence denied petitioner his rights to due process of law.

(2) Petitioner was deprived of his constitutional right to a fair trial by a community permeated with an atmosphere of prejudice by reason of unfair and prejudicial publicity.

(3) The totality of the circumstances and conditions existing and occurring in the course of the trial deprived petitioner of a trial meeting the minimum requirements of due process.

(4) The four count indictment which charged petitioner as one of thirteen persons who conspired to kill certain persons was defective in that it lacked the requisite specificity required under the United States Constitution.

Each of these contentions will be discussed separately.

The following facts are not now contested and were not disputed by the defense at petitioner's trial. On October 6, 1931, the victims Lubitsky and Blatt were riding together in an automobile and were shot and killed at approximately midnight at the corner of Bancroft and Franklin Streets in Toledo, Ohio. The victim Bell was

killed on November 30, 1932, at about 11:00 p.m. while riding in an automobile with one Jack Kennedy near the corner of Jackson and Superior Streets in Toledo, Ohio. The victim Kennedy was killed at Point Place near Toledo, Ohio, on July 7, 1933, at 9:30 p.m. At trial, petitioner's defense was that he had no connection with any of the killings.

I.

Petitioner asserts that the witnesses, Ed Beck, John M. Brown, Sam Stein, Ernest Reid, Harry Craig, Robert Schwaite and Helen Buder were coerced into testifying for the prosecution and that the acts of coercion denied petitioner his rights to due process of law.

Ed Beck was originally called by the prosecution on October 25, 1934, and asked various questions regarding his activities at a still and his association with petitioner (Tr. 377-389). The prosecution was surprised by Beck's testimony, and following his examination requested the Court order him to remain about the Courthouse. The Court did so (Tr. 389-390). Beck was then arrested for perjury and incarcerated in the Lucas County jail. He was discharged to the prosecutor on October 27, 1934 (Plaintiff's Exhibit C. 15). On October 29, he was recalled as a witness (Tr. 537-540). His testimony substantially contradicted that given previously.[1]

John H. Brown, who had been a gardener at petitioner's home, was questioned by the prosecution about license plates which were allegedly altered in petitioner's garage on the day Kennedy was killed (Tr. 1274-1298). He testified that he saw four men (Carsello, Mulcary, LaSalle and

[1] In his original testimony Beck admitted working at an illegal still but could not remember who got him the job, who paid him, or the names of other persons working at the still. When he was recalled, Beck remembered the name of his employer and co-workers. These were persons alleged by the prosecution to be associated with petitioner. In neither examination did he recall any association with Licavoli, with the exception of delivering Christmas food baskets at Licavoli's request.

Basset) in petitioner's garage on the morning of the Kennedy killing, cutting up license plates. He could not recall seeing the men putting an altered license plate on the automobile (Tr. 1285-1287). Immediately following his testimony, he was arrested on a charge of perjury and incarcerated in the Lucas County jail by the prosecutor. He was later released and taken to the prosecutor (Plaintiff's Exhibit [redacted]. 15-16). He was again called as a witness, but his testimony was substantially the same (Tr. 1363-1367). He stated that he had seen the four men cut up a license plate and that he had seen nothing else (Tr. 1365).

In addition, prior to the trial of the case, Brown had left Toledo. The prosecutor attempted to subpoena him but was unsuccessful Brown could not be located. Brown's wife was then questioned and informed that unless Brown returned to testify, she would be jailed and her child placed in a detention home. Brown testified that if the prosecutor had not made that threat he would not have testified (Tr. 1296-1297).

Sam Stein, a pawnshop owner, testified that Jake Sulkin, an alleged confederate of petitioner, had purchased from him a gun identified as the Kennedy murder weapon (Tr. 1147-1177). Stein also testified that prior to the trial he was interrogated over a ten-hour period by several persons, including two men identified only as the Clarke brothers (Tr. 1167-1171). He further testified that he was physically beaten until he told them that he had sold the gun to Eugene Sulkin (Tr. 1170-1171). Respondent does not deny that Stein was physically beaten (Respondent's Memorandum In Support Of Oral Argument, at pp. 4, 6, May 22, 1970). Stein was originally charged with murder, but the indictment was dismissed following Stein's deposition testimony for the prosecution concerning the sale of the gun to Sulkin (Tr. 1164).

Ernest Reid testified that four men (Mulcary, Carsello,

Mirabella, and one unidentified man) pulled up in front of the Kennedy residence at Point Place on the night of July 7, 1933; that two of them got out of the car, went to a point near the Kennedy residence, and returned to the car with a large bulky object (Tr. 594-597). On cross-examination, Reid testified he was questioned for approximately eight hours by the prosecutor and the Clarke brothers (Tr. 597, 602-606). The Clarke brothers told Reid he was "yellow and a damn fool" (Tr. 603). They told him that if he did not identify pictures of the men he saw the evening of July 7, he would be charged as an accomplice to the crime. Further, he was told that other witnesses had already identified two of the men as Mirabella and English (Tr. 604). The Clarke brothers shouted at him and made him "scared and nervous" during the interrogation (Tr. 606).

Craig (Tr. 1210-1234, 1235-1246) and Schwaite (Tr. 1246-1274) testified that they witnessed the Kennedy killing. They identified two men (English and Mirabella) as the murderers of Kennedy. Craig and Schwaite testified that following the murder they viewed a lineup of the men the police alleged had killed Kennedy and did not make an identification (Tr. 1237, 1268). Both were questioned on a number of occasions by the Clarke brothers (Tr. 1226). They received five dollars each after identifying English and Mirabella (Tr. 1227, 1267) and they received approximately thirty-four ($34.00) dollars in witness fees following the English[2] trial (Tr. 1262). They both were to receive witness fees of one dollar a day following petitioner's trial (Tr. 1242).

Helen Buder (Tr. 1343-1361) also was questioned by the Clarke brothers with regard to an identification.

Petitioner contends that the above facts establish that

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[2] English was a co-indictee of petitioner, who was tried prior to petitioner.

the testimony of the witnesses Beck, Brown, Stein, Reid, Craig, Schwaite, and Buder was coerced, depriving petitioner of his right to due process of law. The Court holds that this contention is without merit.

Petitioner's contention is based upon two factors. First, petitioner argues that the testimony of the witnesses was not reliable because they were coerced by the prosecution. Second, without regard to the truth or falsity of the testimony, the prosecutor's actions in either initiating or permitting the use of coercion on Beck, Brown, Stein, Reid, Craig, Schwaite and Buder, and later calling them as witnesses at trial constituted inquisitorial practices which cannot be countenanced in our system of criminal justice.

It is clear that the prosecutor may not knowingly employ false testimony. *Pyle* v. *Kansas*, 317 U.S. 213 (1942); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Miller* v. *Pate*, 386 U.S. 1 (1967); nor may he conceal exculpatory evidence from the defense. *Brady* v. *Maryland*, 373 U.S. 83 (1963). It has also been long established that without regard to its truth or falsity, a coerced confession may not be introduced into evidence. *Mooney* v. *Holohan*, *supra*; *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, *supra*; *Rogers* v. *Richmond*, 365 U.S. 534 (1960); *Reck* v. *Pate*, 367 U.S. 433 (1961); *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Bowden* v. *Holman*, 394 U.S. 478 (1969).

The Court holds that there is no evidence that the witnesses' testimony was false or that the prosecution knowingly presented perjured testimony. There is some evidence of physical and psychological coercion of witnesses by the Clarke brothers. (See pp. 3-5, *supra*, and the respondent admits that the testimony of Stein and Brown "was partially coerced." (Respondent's Memorandum In

Support Of Oral Argument at p. 4.) However, petitioner presented no evidence, other than that inferred from the transcript of the witness' testimony at trial, that their testimony was in fact false. Each witness testified that he had an original reluctance to appear as a witness for the prosecution. Several witnesses gave more than one version of a particular event. But there is no evidence that the prosecution knowingly presented perjured testimony.

Two of the witnesses, Beck and Brown, were held on perjury charges. There can be no doubt that the State may, and indeed has an obligation, to prefer perjury charges if it has probable cause to believe that perjury has been committed. Beck's testimony on the second occasion he took the stand (Tr. 537-540) and the statements he made to the prosecutor prior to the date of the trial (Tr. 377-390; 537-540) establish that, from all the evidence before this Court, there was probable cause for the prosecutor to believe that Beck had committed perjury. Brown's testimony was substantially similar on each occasion that he testified. See pp. 3-5, *supra*. Therefore, the Court holds that the allegation that perjury charges constituted coercion and a consequent denial of due process is without merit.

The question remains whether the conduct of the prosecution with respect to the witnesses was without regard to the truth or falsity of the testimony presented, so offensive to our concept of a fair trial as to be a denial of petitioner's right to due process of law. It was not. The facts surrounding the questioning of certain witnesses (particularly Brown and Stein) show that the prosecution relied upon techniques which are not consonant with the rights the Constitution accords individuals who have contact with our system of criminal justice. However, these facts do not rise to the level of a denial of petitioner's right to due process. The witnesses testified in an atmos-

phere free from physical or psychological coercion, except the demand that a witness testify truthfully. Each witness testified to the fact of previous coercion, and thus the jury had an opportunity to judge their credibility. Thus any possibility of coercion affecting the credibility of the witnesses could be judged by the jury. *See, People* v. *Portelli*, 277 N.Y. Supp. 2d 931 (1965), *cert. denied* 382 U.S. 1019 (1965); *Bradford* v. *Michigan*, 10 Mich. App. 696 (1968); *appeal dismissed*, 381 Mich. Rep. 779 (1968); *cert. denied*, 394 U.S. 1022 (1969). The jurors also were able to consider the prior inconsistent statements of a witness and contradictions in his testimony in determining credibility. In other words, the testimony produced by the prosecution was presented within the framework of judicial safeguards designed to insure the integrity of the fact-finding process. Therefore, the Court holds that petitioner was not deprived of due process of law with respect to the testimony of the witnesses in question.

II.

Petitioner's second contention is that he was deprived of his constitutional right to a fair trial by a community permeated with an atmosphere of prejudice by reason of unfair and prejudicial publicity. This argument is based upon both pretrial and trial publicity. The evidence before this Court is thirty newspaper articles (Petitioner's Exhibit B) and a statement by a Lucas County prosecutor in argument before the Lucas County Common Pleas Court in May of 1966 that "there was a 'fever pitch' brought in this community not by the trial, nor by the newspaper publicity, but by the history and experience of it by the witnesses of this community" (Petitioner's Exhibit C).

The issue presented is whether there was such a probability of prejudice to the petitioner from the pretrial and

trial publicity that he could not have been afforded a fair and impartial trial by jury. *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333-334 (1966). The goal of the Fifth Amendment guarantee of the right to a fair and impartial trial by jury is that a jury should be "capable of taking in, free of pre-suppositions, evidence submitted in open court," and to avoid a trial when the minds of prospective jurors have been "saturated by press and radio for months preceding by matters designed to establish the guilt of the accused." *Irvin* v. *Dodd*, 366 U.S. 717, 729-730 (1961) (Frankfurter, J., concurring).

The pretrial and trial publicity in this case was not of such proportions as to deprive petitioner of his right to a trial by a fair and impartial jury. There is no allegation of prejudicial radio publicity. The sole source of alleged prejudicial publicity is a local newspaper. The articles were mainly factual accounts of various steps in the criminal proceedings against petitioner. Very little speculation, overt or implied, appears concerning the probable outcome of the proceedings or the guilt or innocence of the accused. The publicity is not massive by any standards, nor calculated to inflame public passions against the accused.

The statement by the assistant prosecutor that the community was in a "fever pitch" is not evidence of prejudice to petitioner resulting from publicity. Such a causal connection is explicitly denied in his statement. It also is not evidence that the community was in a "fever pitch" in the meaning of that term as used in the context of the *Sheppard* case. The Court will instead focus upon the newspaper articles.

The first news account contained in Petitioner's Exhibit B concerns the indictment returned against petitioner and thirteen other persons charging them with conspiracy to

murder and murder of four persons.[3] In all, the exhibit contains seven articles appearing before the trial date. There were references to the prosecutor's "fireless battle to free Lucas County of racketeers,"[4] the "Licavoli gang,"[5] and Licavoli, "the gang leader"[6] in the pretrial articles. However, there were no articles asserting petitioner's guilt or urging community vengeance.[7]

Several articles appearing in the newspaper before trial reporting the slaying in Detroit, Michigan, of one Jimmy Hayes, reputed Toledo gambling figure, are included among the exhibits of pre-trial newspaper articles. These articles assert that Detroit police officials immediately "linked" the killing to the "Licavoli mob."[8] Although these articles make serious innuendos about Licavoli and his alleged gang, they do not amount to massive, pervasive, virulent publicity deluging the community with preconceptions of guilt before trial. See, *Sheppard* v. *Maxwell*, 384 U.S. 333, 349-369 (1966).

Twenty-one articles appearing in the Toledo *Blade* between October 9, 1934, and November 8, 1934, are included in petitioner's Exhibit B to support the allegation of prejudicial testimony appearing during trial. In addition, two articles recount the period of the jury's deliberation, the sentencing, and plans for petitioner's incarceration. The Toledo *Blade* is a daily newspaper and the articles appear over a period of one month. These articles, with several exceptions, do no more than recount the events at trial.

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[3] "Licavoli, 13 Other Indicted In Slayings," Toledo *Blade*, March 3, 1934.

[4] *Id.*

[5] *Id.*

[6] "Licavoli: Death Trial Set To Begin October 9" Toledo *Blade*, September 5, 1934.

[7] *Sheppard* v. *Maxwell*, 384 U.S. 333, 337-342 (1966).

[8] "Jimmy Hayes Found Slain In Detroit Alley," Toledo *Blade*, October 4, 1934; "Hayes Murder Suspect Seized," Toledo *Blade*, October 5, 1934.

Taken as a whole, these articles are no more sensational than the trial and report nothing that was not presented to the jury.

The nature and content of these articles show that the publicity during the Licavoli trial did not approach in sensationalism, vituperativeness, intensity, or magnitude the publicity preceding the Sheppard trial. See *Sheppard* v. *Maxwell, supra.* During petitioner's trial there was no carnival atmosphere in the courtroom with photographers and reporters within the rails, radio broadcast from the courtroom, or other activities of a nonjudicial nature during and immediately preceding and following court sessions. The jurors were not treated as celebrities and continually subjected to public scrutiny.[9] There was no newspaper publicity questioning judicial procedure or demanding a relaxation of the requirements of due process of law. Most importantly, the case was not tried in the newspapers rather than the courtroom. *See, Sheppard* v. *Maxwell, supra,* at 350. Accounts of "testimony" not presented to the jury did not appear in the newspaper, and prosecuting officials or law enforcement agents did not rebut sworn testimony through the news media. The articles appearing in the newspaper were not misleading nor calculated to stir the passions of the community to a point where a fair and impartial trial by jury could not be held.

Moreover, defense counsel did not move for a change of venue[10] nor did he at any time object to the presence of

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[9] The names, addresses and a picture of the jurors did appear in the newspaper following the empaneling of the jury and following their viewing of several scenes related to proposed testimony. "Licavoli Jury Is Completed," Toledo *Blade*, October 12, 1934; "Licavoli Death Penalty Asked," Toledo *Blade*, October 22, 1934.

[10] Defense counsel did, before trial, make a public plea in the local newspapers for a fair and impartial consideration of the case by prospective jurors. "Licavoli Trial Counsel Asks For Fair Play," Toledo *Blade*, October 5, 1934.

reporters or their activities in the courtroom or to newspaper accounts of the trial. Petitioner did not move for a continuance nor for a mistrial on the ground of prejudicial publicity. The failure to raise the issue of prejudicial publicity does not preclude review, but it is an important indicia that the publicity did not have the impact alleged. *Stroble* v. *California*, 343 U.S. 181, 194 (1952); *Nichols* v. *Henderson*, 389 F.2d 990, 992 (6th Cir. 1968). The absence of a motion to sequester the jury also raises doubts as to the alleged nature of the publicity and its probable impact upon the jury.

To preserve petitioner's right to a fair and impartial jury, the trial court repeatedly admonished the jury not to read the newspapers or discuss the trial in any manner. *See, e.g.*, Tr. 454, 598, 1310, 1550. Under ordinary circumstances it must be presumed the jury will follow such instructions by the Court. *United States ex rel. Stickler* v. *Tehan*, 365 F.2d 199 (6th Cir. 1966); *cert. denied*, 386 U.S. 992 (1967); *Epperson* v. *Maxwell*, S.D.E.D., Ohio, (April 20, 1970).

The Court holds that, under the circumstances of this case, it could reasonably be expected that each juror could exclude any preconception of guilt he might have formed through pretrial publicity from his deliberations. See *Irwin* v. *Dowd*, supra, at 727.

III.

Petitioner asserts that the totality of the circumstances and conditions existing before trial and occurring in the course of the trial deprived him of a trial meeting the minimal standards of due process of law. He contends that the trial was conducted with a fundamental lack of fairness in that:

(a) The trial court sanctioned protracted argument by the prosecutor that defendant had not taken the stand;

(b) The prosecutor condemned the defendant in argument for exercising his right to representation by counsel;

(c) Testimony which was the fruit of wire-tapping was introduced in evidence;

(d) A great mass of irrelevant, hearsay and prejudicial testimony was introduced in evidence, including exculpatory statements made by defendant to police officers;

(e) The prosecutor conducted the trial in an atmosphere of overbearing oppression;

(f) Prosecution witnesses were coerced by physical beatings and by threats of prosecution and persecution; and

(g) There was a publicity campaign resulting in a prejudicial atmosphere with hatred of and antagonism toward the defendant in the trial community, concluding in a trial conducted in a carnival atmosphere.

In addition, petitioner urges the Court to review the entire proceedings in its consideration of the alleged deprivation of a fair trial. *Cf. U.S. ex rel. Rutherford v. Deegan*, 406 F.2d 217 (2nd Cir. 1969).

The Court has considered each of these factors and has reviewed the Bill of Exceptions in its determination of the merits of this allegation. The Courts holds that, considering the totality of the circumstances, petitioner was not deprived of a fair trial and his rights to due process of law. Each of the allegations made by petitioner will be considered separately.

In closing argument the prosecutor stated:

> He [the petitioner] hasn't courage, he is a coward, he is hidden behind alibis, hidden behind his lawyers. (Objection, Overruled, Exception.) He doesn't take the stand to testify as he would if he were a man, he

> hides behind them or he hides behind the alibi when he is away. Of course he is quiet. (Tr. 1520)

This statement to the jury was clearly a comment on petitioner's failure to testify which has been subsequently held constitutionally impermissible. *Griffin* v. *California*, 380 U.S. 609 (1965). However, *Griffin* is not retrospective in application. *Tehan* v. *Shott*, 382 U.S. 406, *rehearing denied*, 383 U.S. 931 (1966). Petitioner argues that the prosecutor's statement went beyond a reference to petitioner's failure to testify and constituted a comment on his exercise of his constitutional right to representation by counsel. The Court cannot accept this construction of the prosecutor's comment. The clear intention of the argument, read in context, was to emphasize the petitioner's failure to testify, not to condemn him for retaining counsel. The phrase "he hides behind his lawyers" is simply one way of stating petitioner did not testify in his own behalf, as the prosecutor's next sentence[11] makes explicit. Therefore, the comment was permissible and does not constitute error. See, *Tehan* v. *Shott*, *supra*.

Petitioner contends that testimony concerning certain conversations overheard by means of wiretapping contributed to a trial which did not meet the minimal standards of due process of law. Evidence obtained by wiretap was admissible in Ohio at the time of the trial. *See, Mapp* v. *Ohio*, 367 U.S. 643, 652 (1961). The suppression rule announced in *Mapp* is not retroactive. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); therefore the testimony was not constitutionally impermissible.

Petitioner further contends that a great mass of irrelevant, hearsay and prejudicial testimony was introduced in evidence and contributed to a deprivation of his right to a

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[11] "He doesn't take the stand to testify as he would if he were a man . . ." (Tr. 1520).

fair trial.[12] Specifically, petitioner asserts that the testimony of several witnesses that they met the petitioner on the occasion of his being arrested (on several different occasions) was prejudicial. (See, Tr. 251-254; 406, 411, 417, 418, 437, 439, 440, 443, 444, 448, 452, 485, 488, and 506). The purpose of this line of questioning was presumably to qualify the witnesses. These allegations of error have been ruled upon by the Ohio courts, and the testimony was held admissible. *Licavoli* v. *Ohio*, No. 3008, Lucas County Court of Appeals, April 20, 1935. The allegations do not amount to a denial of any constitutional right, and it is not the function of this court to correct evidentiary errors committed in a state trial court. *See Jackson* v. *California*, 336 F.2d 521, 524 (9th Cir. 1964). Therefore, even if it were assumed through hindsight that the trial court erred in the admission of certain testimony, the Court holds that such error, under the particular facts of this case, is not of constitutional dimensions.

The allegation that the prosecutor conducted the trial in an atmosphere of overbearing oppression is not supported by the record.

The allegations that the testimony of several witnesses was coerced and that prejudicial publicity denied petitioner his right to a fair and impartial jury have already been considered. See p. 3-8, *supra*.

Petitioner contends that, even though each of the allegations of error taken individually may not constitute a violation of his constitutional rights, the numerous alleged errors in the conduct of the trial contributed to the totality

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[12] As examples, petitioner cites the testimony of the witnesses Thompson (Tr. 162); Fatoties (Tr. 189); Petcoff (Tr. 210); Ingabosbe (Tr. 224); Matoney (Tr. 226); Irwin (Tr. 230); Brenon (Tr. 249); Thorpe (Tr. 273); Holderman (Tr. 286); Marea (Tr. 324); Eckerman (Tr. 390); McBride (Tr. 397); Green (Tr. 404); Sheets (Tr. 410); Ford (Tr. 505); Gromintz (Tr. 527); McCarthy (Tr. 563); Timiney (Tr. 681); and Marks (Tr. 1122).

of the circumstances constituting the deprivation of petitioner's right to a fair trial. This argument is built upon the use of the "totality of the circumstances" test used in *Miranda* v. *Arizona*, 384 U.S. 499, 503-504 (1966) (concurring opinion of Clark, J.) and *Sheppard* v. *Maxwell*, 384 U.S. 333, 352-355 (1966). Neither of these cases, nor any other known to the Court, suggest as sweeping an approach as put forth by petitioner. Justice Clark's *Miranda* opinion limited the totality of the circumstances to facts establishing the voluntariness or involuntariness of a confession. See, e.g., *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963); *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Boulden* v. *Holman*, 394 U.S. 478 (1969). *Sheppard* was concerned with the effect of publicity and the presence of reporters and their conduct at trial upon the right of a criminal defendant to a fair trial by an impartial jury. Each case involves a judgment about a subjective event which cannot be made on the basis of any one particular fact, but rather requires that the decision maker weigh a number of factors, each of which is entitled to varying weight. These cases are not authority for the proposition that a Court in habeas corpus should take a sweeping overview of a case to make a determination of whether a trial or conviction was fair or just without an articulation of specific constitutional errors.

Therefore, the Court having reviewed the allegations in the petition and the record and having found no specific constitutional deprivation, holds that petitioner was not denied his right to a fair trial.

IV.

Petitioner contends that the indictment was constitutionally defective because it charged him with conspiracy to murder which is not a crime in Ohio. The Ohio appellate courts held that the indictment charged petitioner with first degree murder in conformity with the laws of Ohio. *Licavoli* v. *Ohio*, No. 3008, Lucas County Court of Appeals,

April 20, 1935, appeal dismissed sub nom., *Ohio* v. *Licavoli*, No. 29878, Supreme Court of Ohio, December 22, 1965. The state court's interpretation of the indictment is binding upon this court, unless the indictment violated petitioner's constitutional rights. *See, Jackson* v. *California, supra.* The sufficiency of an indictment is not cognizable in habeas corpus. *Kimbro* v. *Bomar*, 333 F.2d 755 (6th Cir. 1964); *Via* v. *Perini*, 415 F.2d 1052 (6th Cir. 1969). Therefore, petitioner's contention is without merit.

Wherefore the Court holds that the petition is without merit, and therefore it is Denied.

This action is hereby dismissed.

Joseph P. Kenneary
United States District Judge

SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1970

No. 70-221

THOMAS LICAVOLI,
Petitioner,

vs.

E. L. MAXWELL, Warden,
Ohio State Penitentiary,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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II. PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY VIRTUE OF PRETRIAL AND TRIAL PUBLICITY.

III. PETITIONER'S INDICTMENT WAS NOT DEFECTIVE AND INSUFFICIENT SO AS TO RENDER HIS SUBSEQUENT TRIAL VOID UNDER THE UNITED STATES CONSTITUTION.

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STATEMENT OF THE CASE

On March 8, 1934, petitioner and others specifically named were indicted by the Lucas County Grand Jury on four counts of First Degree Murder. Petitioner was tried before a jury and on November 9, 1934, said jury returned a verdict finding him guilty as charged on all four counts but recommended mercy. Consequently, petitioner was sentenced to life imprisonment in the Ohio State Penitentiary.

Petitioner appealed his conviction to the Lucas County Court of Appeals. On April 24, 1935, said Court affirmed the convictions in a lengthy opinion. Petitioner did not choose to appeal that decision as a matter of right. However, some thirty years later, he filed a motion for delayed appeal in the Ohio Supreme Court. On December 22, 1965, said Court dismissed the appeal on the basis that no substantial constitutional question existed.

Petitioner then filed a petition to vacate sentence under the Ohio post-conviction procedure in the Lucas County Court of Common Pleas. See §2953.21, et seq., Ohio Revised Code. Oral arguments were held and on June 2, 1966, the Court denied the petition. On Decem-

ber 13, 1966, the Lucas County Court of Appeals denied petitioner's motion for leave to appeal. Petitioner then appealed to the Ohio Supreme Court. On April 26, 1967, said Court dismissed the appeal on the basis that no substantial constitutional question existed. Petitioner then sought the writ of certiorari in the United States Supreme Court. On October 9, 1967, this Court denied certiorari. *Licavoli v. Ohio,* 389 U.S. 830 (1967).

Petitioner then filed a petition for the writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division. Pleadings were filed and on June 30, 1969, oral argument was held and the case submitted to the Court. The trial bill of exceptions was admitted into evidence by stipulation as were newspaper clippings relating to pretrial and trial proceedings. However, on January 28, 1970, the Court granted a motion allowing F. Lee Bailey and Gerald Alch to appear for the petitioner as co-counsel with petitioner's previous attorneys of record, Moses Krislov and Joseph Rotondo. Subsequently, on April 17, 1970, over objection of respondent, an evidentiary hearing was held. Shortly after the conclusion of the hearing, counsel for petitioner and respondent each filed a memorandum in support of oral argument.

On July 9, 1970, the District Court denied the petition for the writ of habeas corpus. An appeal then was perfected to the United States Court of Appeals, Sixth Circuit, which, after oral hearing, affirmed the judgment of the district court. It is the judgment of the Court of Appeals that the petition filed herein seeks to review.

I. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW THROUGH THE FACT THAT SOME TESTI-

MONY WAS ADDUCED DURING THE TRIAL THAT INITIALLY HAD BEEN PROMPTED BY COERCIVE MEANS WHEN THE FACTS REGARDING THE COERCION WERE BROUGHT TO THE ATTENTION OF THE JURY.

Petitioner has apparently coupled the claim of coerced testimony with an implied allegation of perjured testimony. He does so by stating the issue as follows:

"THE ADMISSION OF TESTIMONY OF WITNESSES COERCED BY STATE OFFICIALS WITHOUT REGARD FOR TRUTH DOES DENY A DEFENDANT HIS RIGHTS TO DUE PROCESS OF LAW."

(Petition page 11)

The respondent vehemently denies that there is any evidence that the prosecution used perjured testimony in this case. In addition, respondent points out that all of the witnesses themselves testified under oath that their testimony was completely truthful. Respondent admits that there was coerced testimony used but believes that under the facts of this case said testimony was clearly admissible.

Petitioner has stated that numerous witnesses were coerced into testifying and alleges, by innuendo, that their testimony was perjured. Respondent believes that with noted exceptions in regard to coercion this allegation is unfounded. Before examining the testimony of the appropriate witnesses pertaining to this allegation an uncontroverted fact must be set forth. Prior to petitioner's trial, Lucas County officials were working with two individuals from Detroit, Michigan, known as the Clarke Brothers. These individuals apparently were not brothers nor named Clarke. The record does not reflect

whether or not these men were hired by anyone in Lucas County and does not reflect their "profession." In any event, it is clear that they questioned numerous witnesses in this case and in one instance coerced testimony from a witness by force. With that admission, respondent will now review the testimony of the witnesses of whom petitioner complains.

Petitioner complains of the testimony of Helen Buder. The reason for doing so is unknown to the respondent. It is contained in the bill of exceptions, hereinafter referred to as Tr., marked Exhibit A in the district court, at pages 1343-1363. Buder was a witness to the murder of Jack Kennedy. In petitioner's trial, she positively identified "Wop" English as one of the murderers (Tr. 1344). English had been tried and found guilty prior to petitioner's trial. However, Buder did not testify in the English trial. She admitted that she had talked to the Clarke Brothers prior to the English trial but had not identified anyone (Tr. 1346). Shortly after English was convicted, she came to the prosecutor's office and stated that she recognized English as the killer of Jack Kennedy. There was absolutely no evidence that her testimony was false and absolutely no evidence that it was coerced. In answer to the question as to why she did not identify English initially, she stated:

> "Well, one thing was fear, the largest thing, fear that I would be implicated in it." (Tr. 1348)

The allegation of perjury and coercion regarding Helen Buder's testimony is totally frivolous.

Petitioner next complains of the testimony of Harry Craig (Tr. 1210-1246) and Robert Schwaite (Tr. 1246-1274). These young men witnessed the murder of Jack Kennedy and identified his killers as "Wop" English and

John Mirabella. Their presence at the scene and their testimony was corroborated by Helen Buder (Tr. 1344-1345). Petitioner complains that their testimony was adduced through coercion and monetary reward. Nothing could be further from the truth. The monetary inducement claim stems from the fact that the witnesses, Harry Craig and Robert Schwaite, received witness fees, $6.00 between them for cab fare after a session in the prosecuting attorney's office, .50 cents to make phone calls and money they lost from their jobs while they were held in protective custody during the trial of "Wop" English. This amount totaled $25.00 apiece. So, petitioner, by innuendos, indicates that these two witnesses, who at first denied they could identify the killers of Jack Kennedy, changed their testimony and perjured themselves for $28.25 each! Evidently, petitioner feels that anyone who accepts witness fees in a court of law is automatically susceptible to a possible perjury charge based on the theory of monetary inducement.

Petitioner is correct when he states that the witnesses did not identify the men, whom they later identified as the men who killed Jack Kennedy, when those same men were placed in a lineup. However, he fails to cite their reasons for not doing so. Harry Craig testified in answer to the question of why he did not identify the men at that time that "Well, I had seen them work and I didn't want to get messed (sic) with them." (Tr. 1243) Robert Schwaite testified that he did not immediately identify the men "Because I was scared to." The fact that they were scared and uncomfortable during the time they were questioned is understandable. They were two young men who witnessed a cold blooded murder from a short distance. Of course they were scared and nervous, but it wasn't because of the Clarke Brothers.

Once again, their testimony was before the jury and the jury alone could decide whether or not it was true or false. In either event, no constitutional rights of the petitioner were violated.

Next petitioner alleges that the testimony of one Ernest Reid was coerced. (Tr. 594-607) Reid identified an automobile and its occupants which allegedly was used in an attempt to murder Jack Kennedy. During the questioning of the witness before the trial, the Clarke Brothers yelled at him, accused him of being a coward and threatened him. However, the witness testified in court that he did lie concerning the identifications and that the Clarke Brothers only effect on him was that he "told the truth, but a little bit quicker." (Tr. 606) It is clear that the witness was understandably somewhat reticent to become involved in the affair and it is equally clear that petitioner's constitutional rights were not violated because of the fact that the witness told the truth "a little bit quicker." Once again, petitioner's complaint seems to revolve around the point that a witness testified as to the truth of the matter, not to the falsity of same.

Petitioner's next example of "coerced testimony" regards the witness Ed Beck (Tr. 377-390, 537-540). Beck was originally called by the prosecution and asked various questions regarding his activities at a still. Beck admitted he was employed at an illegal still but disclaimed any recollection of the names of people who worked there, who got him the job, and who paid him his wages (Tr. 377-390). Following his testimony, the witness was incarcerated in the county jail on a charge of perjury. Shortly thereafter, he was recalled by the prosecution and answered the questions propounded to him. He admitted that his initial testimony had not been true (Tr. 537-540). Petitioner's counsel, who undoubtedly

was cognizant of the fact that Beck had been held on a perjury charge, did not even cross-examine the witness. Where is the coercion? Beck was not beaten or mistreated in any manner and his jailing cannot be considered to be an act of coercion.

But even more important is Beck's later testimony. Where is the perjured part of said testimony? Petitioner does not cite same and his trial counsel did not even attempt to cross-examine the witness. If the witness perjured himself, it is clear that it took place during his initial testimony when, for all purposes, he remained silent. It is clear that Beck's uncontradicted testimony, given when he was recalled by the prosecution, was not false and did not deprive petitioner of his right to due process. In any event, his credibility was an issue for the jury.

In addition, the prosecutor clearly had grounds for holding Beck for contempt. As the district court stated in its opinion;

> ". . . There can be no doubt that the State may, and indeed has an obligation, to prefer perjury charges if it has probable cause to believe that the perjury has been committed. Beck's testimony on the second occasion he took the stand (Tr. 537-540) and the statements he made to the prosecutor prior to the date of the trial (Tr. 377-390; 537-540) establish that, from all the evidence before this Court, there was probable cause for the prosecutor to believe that Beck had committed perjury . . ."
> (p. 7 of lower court opinion)

Furthermore, the testimony Beck did eventually give was hardly harmful to petitioner. It basically consisted of Beck's acknowledgement that he worked with various people, alleged to be associated with the petitioner, at

an illegal still. The district court summarized his testimony as follows:

> "In his original testimony Beck admitted working at an illegal still but could not remember who got him the job, who paid him, or the names of other persons working at the still. When he was recalled, Beck remembered the name of his employer and co-workers. These were persons alleged by the prosecution to be associated with petitioner. In neither examination did he recall any association with Licavoli, with the exception of delivering Christmas food baskets at Licavoli's request."
> (Petition page 26)

The testimony reflecting that various individuals were "associated" with the petitioner was voluminous and it is hard to conceive how he was damaged by the fact that Beck admitted he had delivered "Christmas food baskets" to individuals at petitioner's request. Regardless of the harm, it is clear that the testimony was admissible.

Petitioner's next example of coerced testimony deals with the witness John Henry Brown. Brown was employed by petitioner as a sometimes gardener and handyman. When he was first called by the prosecution, Brown testified that on the day Jack Kennedy was killed he saw several named men in Licavoli's garage cutting up license plates (Tr. 1287). Petitioner is in error when he alleges that Brown did not testify to that fact when he was first called. Brown had previously testified before the Lucas County Grand Jury that he saw the above men putting two license plates together. However, when called in the trial of Licavoli, he claims he did not so testify, but that, if he did, it was because of threats to his wife (Tr. 1287-1288, 1292). However, Brown subsequently admitted that when he testified before the Grand

Jury, he did so freely and no threats had been made to him or his wife at that time (Tr. 1289).

After he testified before the Grand Jury, Brown left town and went to Norwalk, Akron, Detroit and Sandusky. The prosecuting attorney attempted to subpoena Brown to testify in the Licavoli trial but was unsuccessful as Brown's whereabouts were not known. Brown's wife was then questioned and informed that unless Brown returned to testify (not to testify falsely) that she would be jailed and her child put in a detention home. Brown admitted that if the prosecuting attorney had not made that threat, he would not have returned to testify (Tr. 1297). However, when he did testify, he maintained that he did not recall seeing any license plates being put together in the Licavoli garage the day Jack Kennedy was murdered. After he concluded his testimony, he was jailed on a perjury charge based upon his conflicting sworn testimony.

Subsequently, Brown was recalled by the prosecution. He again stated that he witnessed the named men cutting up license plates but still did not testify that he saw them putting the plates together. He also testified that at no time was he ever mistreated by the prosecution. In essence, his testimony was identical to what he had previously testified to. Nowhere in his testimony is there any indication that he testified falsely. Even when he was first called, he stated that all the prosecuting attorney had requested of him was that he "tell the truth, no matter what it was" (Tr. 1296, 1298). The mere fact that pressure was brought to bear upon the witness to get him to return to Toledo so he might testify did not violate petitioner's constitutional rights. In fact, the witness indicated that he did not wish to testify in the case unless the state furnished him "protection" (Tr. 1297).

It is clear he did not seek to be protected from the prosecuting attorney. In any event, the fact that pressure was brought to bear on the witnesses was a fact known by the jury and Brown's credibility was an issue for them to decide.

The obvious fact that Brown's testimony did not change when he was recalled was found to be true by the district court. That court stated:

> ". . . Brown's testimony was substantially similar on each occasion that he testified. See pp. 3-5, *supra*. Therefore, the Court holds that the allegation that perjury charges constituted coercion and a consequent denial of due process is without merit." (Petition page 30)

Although respondent believes that the testimony of Brown and the others previously referred to was admissible even if coerced, for reasons to be shown shortly, the testimony, if inadmissible, was harmless error under the criteria of *Chapman v. California,* 386 U.S. 18 (1967). Brown's testimony was damaging to the petitioner in that he stated that during the afternoon of the day Jack Kennedy was murdered he observed certain men in petitioner's garage cutting up license plates (Tr. 1287). Certain witnesses to the killing itself noted the license number of the car used in the slaying and it was stipulated at the trial the license number testified to did not exist (Tr. 1367). Previous testimony had established that the men mentioned by Brown were "members of petitioner's gang." However, other testimony concerning the Kennedy killing was far more damaging to Licavoli.

Harry Craig witnessed the killing and positively identified "Wop" English and John Mirabella as the killers (Tr. 1213-1218). The identification of two of petitioner's underlings as the murderers was obviously far more

damaging to petitioner than the testimony reflecting that certain men had been cutting up license plates in his garage prior to the killing. Craig's testimony was totally corroborated by his companion, Robert Schwaite (Tr. 1247-1252, 1265, 1271). In addition, Helen Buder witnessed the Kennedy killing and positively identified "Wop" English, whom she knew personally, as one of the killers. In addition, she testified that she saw Craig and Schwaite at the murder scene (Tr. 1344-1345). Thus, it is clear that Brown's testimony, even if erroneously admitted, was harmless error.

Finally, petitioner complains about the testimony of one Sam Stein (Tr. 1147-1177; 1234-1235). His allegation that Stein's testimony was initially induced by coercion cannot be denied. Nevertheless, under the facts of this case, his testimony was properly admitted. Stein was employed in a local pawn shop which sold a gun used in the murder of Jack Kennedy. Stein testified that he received the gun on March 17, 1933, and subsequently, between April 17 and late May, 1933, he sold the gun for $17.50 to "Firetop" Sulkin, a member of Licavoli's gang. On cross-examination, Stein admitted that this was his third different story regarding the gun. (Tr. 1162-1167). He initially told the prosecutor that he took the gun, himself, from the pawn shop and gave it to an unknown man named "Doc" for a $5.00 loan. Inasmuch as he could not show that he did not have the gun in his possession during the time Jack Kennedy was murdered, he was held on a charge of first degree murder by the prosecutor's office. He then changed his story and stated that he had given the gun to one Morris Asher for a loan of $5.00. Approximately a week after this story, Stein was questioned again by the two private investigators named "the Clarke Brothers." During the questioning of the

witness, Stein was physically beaten and ultimately stated that he had, in fact, sold the gun to "Firetop" Sulkin. He signed a deposition reflecting same. Respondent does not deny that Stein was physically beaten and, of course, does not condone such treatment. Nonetheless, the petitioner's constitutional rights were not violated by those actions. It is interesting to note that when Stein was under oath his stories never varied. His deposition and his courtroom testimony were identical. Stein admitted that his first stories were lies and that the truth of the matter was that he did sell the aforementioned gun to "Firetop" Sulkin (Tr. 1176). He stated that his testimony during Licavoli's trial was the truth (Tr. 1167-1173).

Once again, all of this information was brought out before the jury. They knew Stein's character and they knew he had been beaten prior to the time he named Sulkin as the purchaser of the murder weapon. Whether or not they chose to believe his testimony is something we will never know. However, that was their province and the petitioner's constitutional rights were not violated by the testimony.

The record proves that the physical coercion of Stein was brought to the attention of the jurors. Respondent believes that this fact, coupled with the fact that Stein testified unwaveringly that his testimony was true, enabled the jury to test its credibility. As the high court of New York stated in a unanimous decision in *People v. Portelli*, 257 N.Y. Supp. 2d 931 (1965); *cert. denied*, 382 U.S. 1019:

> ". . . On cross-examination, *Melville* stated that later the same day several detectives took him to a police station for questioning and that, although he

first denied knowing Portelli or anything about the crime, he finally told the police the story which he gave in court. But he declared that he did so only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner. However, he insisted from the witness stand that the pre-trial statement, which he made to the police, as well as his testimony, implicating Portelli was completely true.

"It is the defendants' contention that the witness' testimony should have been stricken once it appeared that his statement, although given some eight months before the trial, had been coerced by the police.

"Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a *witness* who, *although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury.* (See 3 Wigmore, Evidence [3d ed., 1940], §815, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is *disclosed to the jurors so that they may pass upon the witness' veracity and credibility* and determine whether the testimony given in open court is truthful and worthy of consideration.

"In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible

conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct." (p. 932-933)

See also *Bradford v. Michigan,* 10 Mich. App. 696 (1968); *appeal dismissed,* 381 Mich. Rep. 779 (1968); *cert. denied,* 394 U.S. 1022 (1969).

As the district court stated in its opinion:

"The question remains whether the conduct of the prosecution with respect to the *witnesses* was without regard to the truth or falsity of the testimony presented, so offensive to our concept of a fair trial as to be a denial of *petitioner's* right to due process of law. It was not. The facts surrounding the questioning of certain witnesses (particularly Brown and Stein) show that the prosecution relied upon techniques which are not consonant with the rights the Constitution accords individuals who have contact with our system of criminal justice. However, these facts do not rise to the level of a denial of *petitioner's* right to due process. The witnesses testified in an atmosphere free from physical or psychological coercion, except the demand that a witness testify truthfully. Each witness testified to the fact of previous coercion, and thus the jury had an opportunity to judge their credibility. Thus any possibility of coercion affecting the credibility of the witnesses could be judged by the jury. *See, People* v. *Portelli,* 277 N.Y. Supp. 2d 931 (1965), *cert. denied* 382 U.S. 1019 (1965); *Bradford* v. *Michigan,* 10 Mich. App. 696 (1968); *appeal dismissed,* 381 Mich. Rep. 779 (1968); *cert. denied,* 394 U.S. 1022 (1969). The jurors also were able to consider the prior inconsistent statements of a witness and contradictions in his testimony in determining credibility. In other words, the testimony produced by the prosecution was presented within the framework of judicial safeguards designed to insure the integrity

> of the fact-finding process. Therefore, the Court holds that petitioner was not deprived of due process of law with respect to the testimony of the witnesses in question." (Emphasis added) (Petition pages 30-31)

In addition, the respondent believes that even if the testimony is illegally admitted into evidence, which is not conceded, it was harmless error under the criteria of *Chapman v. California, supra.*

In view of the above, respondent believes that the testimony of all the above mentioned witnesses was clearly admissible. There is not a scintilla of evidence indicating that any of the testimony was perjured, much less known to be perjured by the prosecution. The evidence in fact is totally to the contrary. Furthermore, no confessions, coerced or voluntary, were introduced. Thus, petitioner's citations including *Pyle v. Kansas,* 317 U.S. 213 (1942), concerning the knowing use of false testimony; *United States v. Consolidated Laundry,* 291 F. 2d 563 (1961), concerning the prosecution's suppression of evidence favorable to the defense; and *Miranda v. Arizona,* 384 U.S. 136 (1966), concerning the use of coerced confessions, are not applicable to this case.

Admitting that the testimony of Stein was initially procured by coercion, the facts of the coercion was before the jury. The court having found the testimony to be admissible, the question for the jury was one of credibility and not admissibility. The only cases cited by either party support respondent's position.

II. PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY VIRTUE OF PRETRIAL AND TRIAL PUBLICITY.

In his petition petitioner sets forth some thirty headlines which, combined, he claims constituted publicity which denied him the right to a fair trial. Respondent believes that a review of such headlines disproves petitioner's contention. Many of the headlines, as indicated by petitioner, were not main headlines. Respondent believes that the headlines in question can be divided into three classes. The first class consists of headlines which occurred prior to trial and clearly were not prejudicial to petitioner. It is safe to say that stories relating to petitioner's indictment, date of trial, defense, and like matters did not tend to deprive him of his right to a fair trial. Respondent believes that in no way could they be construed to have had any possible effect on the fairness of petitioner's trial.

The second class of headlines, indeed the majority of them, deal with publicity which occurred during the trial. In this connection there never has been any proof that these headlines were seen by the jury who periodically were instructed not to read the newspapers by the trial court. Assuming *arguendo,* that some of the jurors disregarded the court's instruction and did read the newspapers, they could in no way have effected the judgment of the jury concerning petitioner's guilt or innocence. They contained information that already was known to the jury, and concerned for the most part excerpts or verbatim reports on the testimony that the jury already had heard that particular day. To imply that a reproduction of the evidence could tend to deprive one of a fair trial is ludicrous. Similarly, headlines dealing with such items as when the case would reach the jury and the report of the finding of the jury certainly cannot be considered prejudicial. Cf: *Smith v. United States,* 385 F. 2d 34 (5th Cir. 1967).

The third and final class of the headlines are headlines which the respondent believes could possibly, though speculatively, constitute an iota of prejudice against the petitioner. They read as follows:

> "Jimmy Hayes Found Sain (sic) in Detroit Area; Revenge Murder Blamed on Gang."
> (A sub headline reads: 'Licavoli Mob Blamed')
> "Hayes Murder Suspect Seized."
> (A sub headline reads, in part: 'Licavoli Gang Linked to Killing')

Of course Licavoli was not on trial for the murder of Jimmy Hayes and no reference was made to this in the trial. For that reason, respondent does not believe that any substantial prejudice could have occurred due to the two headlines. However, even if some prejudice could be assumed, it was minute in nature and in no way can it be said that same precluded petitioner from receiving a fair trial. For if any prejudice, no matter how small an amount, can be the basis of reversing a conviction then we must eliminate all trials or repeal the First Amendment to the Constitution of the United States.

The point was aptly stated by Justice Holmes in *Holt v. United States*, 218 U.S. 245, 251 when he stated:

> ". . . If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day. . . ."

Clearly, the twenty-nine headlines set forth by petitioner did not tend to deprive him of a fair trial, even if read, under the decisions of the United States Supreme Court.

But petitioner argues that the publicity also permeated the "community" with an "atmosphere of prejudice." It is interesting to note that he ascribes the

prejudice to the *community* and not the jury. Why? First of all, all of the eventual jurors swore under oath that they did not have a preconceived opinion in the case and that they would render a verdict based solely on the evidence. It is also noted with interest that petitioner did not seek a change of venue. Evidently the "fever pitch" of the community, if in fact said existed, was not of concern to him prior to the time he was convicted.

Before his trial, petitioner was aware of the newspaper stories, and he did not even make a motion for a change of venue. Had he done so, and said motion was granted, he could not argue the point on appeal. Consequently, no motion was made and now he seeks to assert the claim after he has been convicted! In fact, this particular allegation was not raised until petitioner's post-conviction appeal in the Lucas County Common Pleas Court in 1966, some 32 years after his conviction. Not only did he not seek a change of venue but it appears that he specifically desired to be tried in Lucas County, Ohio. In a letter addressed to the public by Mr. Cornell Schreiber, trial counsel for petitioner, reproduced in the Toledo Blade, on October 5, 1934, petitioner disclaimed any intention of seeking a continuance or a change of venue in his case. The letter reads as follows:

> "To the Public: I represent Thomas Licavoli. Mr. Licavoli's trial here is set for next Tuesday, Oct. 9.
> "Many inquiries have come to me as to whether a request would be made for a postponement of the trial or for the removal of the case for trial in another county.
> "Mr. Licavoli does not want the trial delayed, nor does he want the case sent to another county for trial. He does want the case to be tried in this

county on the original trial date, if it is at all possible to secure a fair trial.

"A fair trial is guaranteed by the Constitution to everyone accused of an offense, and a fair trial means that the case shall be heard by a jury that approaches its duty with an open mind, and with no preconceived ideas of guilt or innocence. A fair trial means that the case shall be heard before an impartial judge and that only legally competent evidence shall be allowed.

Appeals for Fairness

"Calm reflection should convince everyone that no man should be tried upon gossip, rumor, lurid reports, passion, prejudice, race hatred, or the numberless other considerations that have no place in an American court, and no man should be tried by word or print upon the streets. The place of trial should be in a court of justice and in no other place.

"Mr. Licavoli has been in jail awaiting trial since March 8, 1934, a period of seven months, and he respectfully asks the public only that he may be permitted to leave these months of weary waiting to appear in court for a fair trial. He asks only that the public be guided solely by the evidence as it may appear under oath and under judicial observation, and by no other influence."

This newspaper article was an exhibit in the case before the United States District Court.

Although the fact that one does not seek a change of venue is not dispositive of the prejudicial publicity claim, it has been held to be "significant proof." *Stroble v. California*, 343 U.S. 181 (1952); *United States ex rel. Darcey v. Handy*, 351 U.S. 454 (1956); *United States v. Rosenberg*, 200 F. 2d 666 (2nd Cir. 1952); *cert. denied*, 345 U.S. 1003; *Nichols v. Henderson*, 389 F. 2d 990 (6th Cir. 1968). In fact, in every major case where the United

States Supreme Court reversed a conviction on the grounds that the defendant had been denied a fair trial due to adverse publicity, a change of venue had been requested and denied. *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Rideau v. Louisiana,* 373 U.S. 723 (1963); *Irvin v. Dowd,* 366 U.S. 717 (1961). It is noted that in the *Handy* case the Court commented on the fact that the publicity issue was not raised until some three years after the conviction. In this matter, as previously noted, it was not raised until 32 years after the conviction even though the petitioner immediately appealed his conviction to the Lucas County Court of Appeals in 1934!

Nor is there any indication that petitioner exhausted his peremptory challenges in impanelling the jury. This fact, considered with the lack of a motion for a change of venue, establishes that petitioner's counsel did not believe that the pre-trial publicity would deny the petitioner his right to a fair trial. The respondent agrees. The same may be said concerning the publicity during the trial. As previously indicated, the vast majority of the publicity was basically the testimony given at the trial. In many cases it was verbatim. Surely this publicity, even if read, was not harmful to the petitioner. *Smith v. United States, supra.* Appellant, at the time of his trial, apparently agreed as a motion was never made to sequester the jury. Nor, after the trial began, was there ever a motion made for a mistrial based upon the publicity. Nor was a motion ever made to interrogate the jury to ascertain if, in fact, they had read a particular story or discussed the trial with anyone in any manner.

The trial judge continually admonished the jury not to read the newspapers or discuss the trial in any manner (Tr. 454, 598, 697, 1310, 1550 and others). It is assumed

that the jury will follow the instructions of the Court. *Epperson v. Maxwell,* #68-142 (S.D., Ohio, 1970).

Petitioner has never even alleged that the jurors disregarded the Court's instructions and read the newspaper accounts of the trial. Nor has he shown that the questioned articles were inherently prejudicial. Consequently, respondent maintains that the petitioner has not sustained the burden of proving that the newspaper publicity denied him a fair trial. *United States ex rel. Stickler v. Tehan,* 365 F. 2d 199 (6th Cir. 1966); *cert. denied,* 386 U.S. 992 (1967); *rehearing denied,* 387 U.S. 926 (1967). The allegation of possible prejudice will not sustain the burden. *Holt v. United States, supra.* He must show the alleged constitutional deprivation by a demonstrable reality and not by mere speculation. *Beck v. Washington,* 369 U.S. 541, 555-556 (1962); *United States ex rel. Darcey v. Handy, supra.* Petitioner has failed to do same.

As previously stated, petitioner at no time has produced evidence indicating that the jury ignored the trial judge's instructions and read the questioned articles. In fact, he has never even alleged that they were read. The assumption that they were read is purely conjecture and without merit. The law requires more. *Harris v. State,* 231 N.E. 2d 800 (1967). As the court stated in *Marshall v. United States,* 258 F. 2d 94, 98 (10th Cir. 1958):

> "The mere appearance of articles concerning the trial cannot compel a new trial . . . A cautionary instruction against prejudice or consideration of evidence beyond that presented in the courtroom has been held in such instances to be sufficient safeguard for defendant's rights."

See also *United States v. Accardo,* 298 F. 2d 133 (7th Cir.

1962). As the court stated in its charge to the jury (Tr. 1550):

> "... You should also keep in mind all of the instructions I have given you not to read any newspapers or permit anyone else to discuss the case in your presence ..."

It is clear that under Ohio Law, the jury is presumed, unless shown to the contrary, to have followed the judge's instructions. As was stated in *State v. Swilling*, 155 S.E. 2d 607 (1967):

> "In order to sustain defendant's position, we would not only have to assume that the jurors were cognizant of the pre-trial publicity, but would have to indulge the further presumption, without basis in fact, that they were prejudiced thereby. . . .
> "The record contains no affirmative showing of prejudice to the defendant from the newspaper publicity during the trial. It is not shown that any juror actually read the news articles in question. Assuming however that the jurors probably read the newspapers, there is a total absence of any showing of actual prejudice to the defendant therefrom . . . The newspaper articles were not such as to automatically prejudice a fair trial and, under such circumstances, prejudice will not be presumed. On the contrary, in the absence of a showing of prejudice, 'we just assume that each and every member of the jury sought honestly and impartially, under the law, to discharge his duty, and that he observed the oath required as a juror'. *State v. Williams*, 166 S.C. 63, 164 S.E. 415." (P. 612-613).

Petitioner, without any substantiating facts, implies that the jury refused to follow the trial judge's specific instructions that they pay no attention and give no weight to any matters concerning the case except that

evidence which was presented in the courtroom. If petitioner was so concerned with this alleged prejudice, why didn't he move for a change of venue or interrogate the jury, prior to their accepting the case for deliberation, concerning the aforementioned articles? In respondent's opinion, the allegation is without merit.

He next argues that the publicity "resulted in a trial conducted in a 'carnival atmosphere' in which a fair trial was denied petitioner" (Petition page 16). He then brazenly cites *Sheppard v. Maxwell, supra,* as authority. The claim can be quickly disposed of. Appellant's "carnival atmosphere" allegation is totally refuted by the record. In fact, it is a statement without any substance whatsoever. What occurred in the courtroom to establish this atmosphere? Unlike *Sheppard v. Maxwell, supra,* there were no photographers in court or radio broadcasts emanating from the courtroom. There was no fight in front of the jury between the prosecution and a witness as petitioner has previously argued. There was no motion for a mistrial because the trial was conducted in an unjudicious manner. In fact, petitioner's attorney in his closing argument stated that the case "moved along, I think, quite smoothly." (Tr. 1464). Clearly, the "carnival atmosphere" allegation is, at best, frivolous. There has undoubtedly never been a trial involving charges of multiple murder that has not been the subject of comment by the media. It is safe to say that this has been true of the press since the advent of Mr. Gutenberg's invention.

It is also clear that under the Constitution of the United States the press has a guaranteed right, with obvious limitations, i.e., *Sheppard v. Maxwell, supra;* to comment on public trials. This right has sometimes resulted in a defendant being denied his constitutional

right to a fair trial. In an effort to guarantee both parties their constitutional rights, numerous legal procedures have evolved. They include the right of a defendant to seek a change of venue. In this case, the petitioner chose not to avail himself of that right. The respondent believes that he did not do so for one reason. There was no need to seek a change of venue because he knew that he could receive a fair trial in Lucas County, Ohio. This is substantiated by the fact that the petitioner never complained about the publicity until some 32 years after his conviction, despite the fact that he did appeal his conviction to the Court of Appeals in 1935! Apparently, time has fathered the prejudicial atmosphere theory as the record clearly shows that facts did not.

In view of the above, the respondent does not believe that petitioner's allegation is meritorious. The publicity itself was not the type that would deprive a defendant of a fair trial. As the district court stated in its opinion:

> "The nature and content of these articles show that the publicity during the Licavoli trial did not approach in sensationalism, vituperativeness, intensity, or magnitude the publicity preceding the Sheppard trial. See *Sheppard v. Maxwell*, 384 U.S. 333-334 (1966). During petitioner's trial there was no carnival atmosphere in the courtroom with photographers and reporters within the rails, radio broadcasts from the courtroom, or other activities of a nonjudicial nature during and immediately preceding and following court sessions. The jurors were not treated as celebrities and continually subjected to public scrutiny.* There was no newspaper publicity questioning judicial procedure or demanding a relaxation of the requirements of due process of law. Most importantly, the case was not tried in the newspapers rather than the courtroom. See, *Sheppard v. Maxwell, supra*, at 350. Accounts of 'testi-

> mony' not presented to the jury did not appear in the newspaper, and prosecuting officials or law enforcement agents did not rebut sworn testimony through the news media. The articles appearing in the newspaper were not misleading nor calculated to stir the passions of the community to a point where a fair and impartial trial by jury could not be held." (Petition page 34) (*footnote omitted)

This, along with the petitioner's decisions not to seek a change of venue, not to seek to have a mistrial declared, not to seek to have the jury sequestered, and not to seek to have the jury interrogated regarding the publicity, destroys his belated argument of a prejudiced trial. In addition to this there is no showing, or even an allegation, that the jury disregarded the trial court's instructions and read the articles in question. Consequently, respondent believes that petitioner was not deprived of his right to a fair trial by the publicity that occurred prior to and during his trial.

III. PETITIONER'S INDICTMENT WAS NOT DEFECTIVE AND INSUFFICIENT SO AS TO RENDER HIS SUBSEQUENT TRIAL VOID UNDER THE UNITED STATES CONSTITUTION.

The indictment clearly charges the petitioner with first degree murder. In addition to the indictment, the prosecuting attorney, on the motion of petitioner's counsel, filed a Bill of Particulars prior to the trial (Tr. 1533). Inasmuch as no further action was deemed necessary by the petitioner after the Bill of Exceptions was filed, it seems obvious that he was satisfied with the specificity of the indictment. Also, inasmuch as no objection to the indictment was made, petitioner waived any complaint concerning the indictment under Ohio law. This waiver

is binding in a federal proceeding attacking the indictment. *Henry v. Mississippi,* 379 U.S. 443 (1965).

Furthermore, this claim was ruled on by the Ohio Appellate Court when petitioner appealed in 1935. That Court stated as follows:

> "An indictment charging the commission of four separate and distinct offenses of murder in the first degree is unusual, and so far as we know without precedent, but it seems to be authorized by Section 13437-3, G. C. No objection to the indictment was made and, therefore, any such defect was waived (G. C. 13437-28) but the objection was made on motion for a new trial, and it is urged here that it does not charge the defendant with murder. It is claimed that the only charge is that of conspiracy to commit murder. There is, — as will be observed, — an express allegation that the defendants conspired, which is unnecessary under the aider and abettor statute. (Section 12380, G. C.) However, there certainly can be no valid objection to expressly stating in an indictment an allegation of fact which is imported by implication of law. Had there been no such averment, the state of the trial would have been required to disclose then that it was not claimed that the defendant on trial had personally done the physical act of killing. Advising the defendant of that in the indictment was to his advantage and not to his prejudice.
>
> "It seems to us that the mere reading of the indictment is sufficient answer to the claim that it does not charge murder in the first degree. It does so charge in direct and explicit language." (pp. 2-3 of Court of Appeals Opinion contained in respondent's Appendix in court below)

This interpretation of state law is binding on the federal courts. *Jackson v. California,* 336 F. 2d 521, 524 (9th Cir. 1964); *Silva v. Cox,* 351 F. 2d 61 (10th Cir. 1965); *cert.*

denied, 383 U.S. 919; *Mounts v. Boles,* 326 F. 2d 186 (4th Cir. 1963).

Finally, it seems clear that the sufficiency of a state indictment is not cognizable in a federal action for the writ of habeas corpus. See *Via v. Perini,* 415 F. 2d 1052 (6th Cir. 1969); *Kimbro v. Bomar,* 333 F. 2d 755 (6th Cir. 1964); *Hanovich v. Sacks,* 290 F. 2d 798 (6th Cir. 1961); *United States ex rel. Tangredi v. Wallack,* 236 F. Supp. 205 (N.Y. 1964); *Affirmed,* 343 F. 2d 752 (2nd Cir. 1965); *Budd v. Rundle,* 267 F. Supp. 49 (E.D. Pa. 1967).

IV. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW DUE TO THE TOTALITY OF THE CIRCUMSTANCES EXISTING DURING THE COURSE OF HIS TRIAL INCLUDING, BUT NOT LIMITED TO, THE ABOVE ALLEGED ERRORS.

Petitioner contends that under the "totality of the circumstances" he was denied due process of law. It is a unique argument and one, to respondent's mind, that has no judicial precedent. He claims that the "totality of the circumstances" test set forth in *Gallegos v. Colorado,* 370 U.S. 49 (1962), is applicable in his case. Respondent is of the opinion that *Gallegos v. Colorado, supra,* is only applicable to questions regarding coerced confessions. The district court agreed. In any event the claim is frivolous. Petitioner argues that even if the questioned testimony of Stein, Brown, Buder and the others was admissible, and even if the pre-trial and trial publicity did not deprive him of a fair trial, and even if the indictment was correct, that one cannot dismiss the claims totally. He asserts they must be included with other non-constitutional alleged errors and then added

together. He states that although none of the separate parts can be considered constitutional error that he can still satisfy the requirement of 28 U.S.C., §2241 (c), by adding them up.

Respondent has already argued the merits of the alleged constitutional violations and will not repeat them at this point. However, respondent will examine the additional "errors" that, coupled with those previously argued, purportedly add up to petitioner being denied his constitutional right to due process of law. He makes two claims. First, he states that he was prejudiced by the fact that the trial judge and the prosecutor "were standing for election which indeed took place during the waning moments of the trial." He then adds, "This inherent evil, it is respectfully submitted, cannot be overlooked for its compelling prejudicial effect. Can it be reasonably doubted that the trial court, in its ruling on Petitioner's Motion for a Directed Verdict on November 3, 1934, was not influenced by the impending election on November 7, 1934?" (p. 21, Petitioner's Brief). Of course, there are no facts to substantiate this inference. Respondent for one can definitely state that he reasonably doubts that the overruling of the motion for a directed verdict was predicated on the upcoming election. So can anyone who wishes to read the bill of exceptions. Furthermore, why is it "inherently evil" to continue to run the courts prior to an election? Respondent knows of no decision indicating that all criminal trials should cease prior to an election because of the fact that one or more of the participants is seeking public office. To impugn the integrity of a judge with this type of innuendo, naked of facts, is ethically questionable. The claim is, charitably, a frivolous one.

Petitioner's final claim is that he was prejudiced by

a statement made by the prosecuting attorney in his closing argument. The basis for petitioner's argument is a comment by the prosecutor found on page 1520 of the Bill of Exceptions. The prosecutor stated:

> ". . . he is hidden behind alibis, hidden behind others, and here he hides behind his lawyers. (Objection, Overruled, Exception.) He doesn't take the stand to testify as he would if he were a man, he hides behind them or he hides behind the alibi when he is away. Of course he is quiet."

Petitioner argues that the statement "he hides behind his lawyers" violated his right to due process of law. The argument, though ingenious, is without substance. It is axiomatic that today the prosecution cannot comment on the fact that a defendant does not take the stand in his defense. *Griffin v. California,* 380 U.S. 609 (1965). However, that decision is not one retroactively applied. *Tehan v. Shott,* 382 U.S. 406 (1966); *rehearing denied,* 383 U.S. 931 (1966). Therefore, it seems that petitioner's argument is without merit. However, petitioner urges that the statement "he hides behind his lawyers" does not refer to the petitioner not taking the stand even though the prosecutor's next words were "He doesn't take the stand to testify as he would if he were a man. . ." Petitioner argues that the statement refers to the fact that he appeared in court with his attorneys instead of appearing alone!

Respondent cannot cite any cases to substantiate his contention that the comment obviously referred to the fact that Licavoli did not take the stand. Similarly, the petitioner cannot cite any cases reflecting that the comment referred to the fact that he appeared in court with counsel. Faced with this dilemma, respondent can only

rely on Noah Webster and Aristotle. Logically speaking, the only way petitioner could hide behind his lawyers was by abiding by their decision and not taking the stand in his defense. How else does one hide? Surely not physically. The prosecutor immediately stated, after the comment in question, "He doesn't take the stand to testify. . . ." This statement merely emphasized the statement it immediately followed. To argue that the statements are totally separate in meaning, despite the context in which they appear, is simply to ignore logic and the English language. If the prosecutor was really attempting to argue to the jury that a man must be guilty if he appeared in court with counsel, he phrased his point poorly. Certainly, he could have enunciated the contention with clarity and not in a vague fashion. A cursory review of the record would convince all that Frazier Reams had the vocabulary and the intelligence to properly phrase a sentence. The statement is not an ambiguous one if the context of the entire paragraph is studied. Clearly, the comment was in reference to Licavoli's failure to take the stand and, as such, is not germane to this action in lieu of *Tehan v. Shott, supra.*

Respondent believes that this "shot-gun" approach is a vain attempt to establish the requisite constitutional violation set forth in 28 U.S.C., §2241 (c). As the district court stated in its opinion regarding this point:

> "Therefore, the Court having reviewed the allegations in the petition and the record and having found no specific constitutional deprivation, holds that petitioner was not denied his right to a fair trial." (p. 40, Petitioner's Appendix)

Respondent urges this Court to so find.

CONCLUSION

Respondent agrees with petitioner's contention that he was entitled to due process of law. However, respondent does not believe that petitioner was denied this constitutional right in his 1934 trial. Clearly, due process of law is a constitutional right that the petitioner was entitled to in 1934. His guilt or innocence of the crimes for which he was indicted is not an issue for this Court. The question is whether or not his conviction was constitutionally obtained. In view of this controverted fact, respondent does not feel that petitioner may argue that he is partially entitled to his release because he has spent 36 years in prison. He argues:

> ". . . The Constitutional irregularities of his trial combined with the amount of time he has spent in prison and further combined with our modern concept of penal rehabilitation as opposed to penal punishment dictates the demand of justice to be that petitioner be released from custody exclusively based upon the total absence of due process of law." (p. 22 of Petitioner's Brief)

Respondent knows of absolutely no precedent for petioner's argument that past punishment is a basis for setting aside a conviction. In fact, the law is to the contrary. See 28 U.S.C.A., §2241. Therefore, respondent believes that Licavoli's comments regarding his past imprisonment should be disregarded due to the fact that past punishment, like guilt or innocence, is not a proper reason to grant or deny the writ of habeas corpus.

In conclusion, respondent submits that the testimony of Stein, Brown and the others was properly admitted into evidence. The pressures brought to bear upon them were known to the jury and consequently the question was one of credibility and not admissibility. The pre-

trial and trial publicity was not inherently prejudicial and in 1934 petitioner's counsel apparently agreed inasmuch as no change of venue was desired. In addition, most of the trial publicity was a rehash of the actual testimony and therefore could not have prejudiced the petitioner. However, it is to be presumed that the jury will follow the court's instructions not to read the newspapers and therefore the allegation is meritless without evidence to the contrary. No evidence to the contrary has been offered by petitioner. In fact, the claim has not even been alleged.

Petitioner's attack against the indictment is without merit for many reasons. The Ohio courts have upheld the indictment as conforming to Ohio law and the federal courts are bound by that interpretation. Also, inasmuch as petitioner did not object to the indictment, he has waived same. *Henry v. Mississippi, supra.* In addition, the sufficiency of a state indictment is not cognizable in a federal habeas corpus action, *Via v. Perini, supra.*

Finally, petitioner's argument that his constitutional rights were violated when the prosecutor stated that petitioner was hiding behind his lawyers is without merit. The comment clearly refers to the fact that he did not take the stand and petitioner may not complain about the comment in this action as the case that prohibited comments of that nature was not given retroactive effect. This meritless claim, coupled with the frivolous claim of prejudice resulting from the impending elections, did not deprive petitioner of his right to a fair trial under the "totality of circumstances" argument.

Respondent believes that petitioner, under the considerations of Rule 19, has shown no special or important reason for this Court to review the decision of the court below. That decision was not in conflict with

any decision of any federal court of appeals on the same matter; nor did it decide an important state question in a way to conflict with applicable state law; nor did it decide an important question of federal law which has not been, but should be, settled in this court; nor has the deciding a federal question in a way in conflict with applicable decisions of this Court.

Respectfully submitted,

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